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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
BEFORE THE HONORABLE EDWARD M. CHEN, JUDGE

DOUGLAS O'CONNOR, et al.,)	
)	
Plaintiffs,)	
)	
VS.)	NO. C 13-3826 EMC
)	
UBER TECHNOLOGIES, INC.,)	
)	
Defendant.)	San Francisco, California
<hr style="border: 1px solid black;"/>		Thursday, August 6, 2015

TRANSCRIPT OF PROCEEDINGS

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(Appearances continued, next page)

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1 **THURSDAY, AUGUST 6, 2005**

2:35 P.M.

2 **P R O C E E D I N G S**

3 **THE CLERK:** Calling Case C-13-3826, O'Connor versus
4 Uber. Counsel, please come to the podium and state your name
5 for the record.

6 **MS. LISS-RIORDAN:** Good afternoon, Your Honor. For
7 the Plaintiffs, I'm Shannon Liss-Riordan. With me is Adelaide
8 Pagano and Matthew Carlson.

9 **THE COURT:** All right, thank you.

10 **MR. BOUTROUS:** And Your Honor, Theodore Boutrous, Jr.
11 for Defendant Uber. With me are Theane Evangelis, Kevin
12 Ring-Dowell and Josh Lipshutz.

13 And I wanted to thank Ms. Liss-Riordan for swapping. I'm
14 going to use some visuals on the screen, so she agreed to try
15 the other side today.

16 **THE COURT:** That's a good idea, to switch.

17 **MR. BOUTROUS:** Good. See how the other person --

18 **THE COURT:** Why don't we argue each other's --

19 **MR. BOUTROUS:** I'm ready.

20 **THE COURT:** And then we have on the phone?

21 **THE WITNESS:** Good afternoon, Your Honor. Chris
22 Morosoff for Steven Price, the State Court Plaintiff in
23 Los Angeles Superior Court.

24 **THE COURT:** And I allowed Mr. Morosoff to appear to
25 listen in, even though they're not parties in this case, and

1 also to be available in case questions come up perhaps in the
2 context of the CMC's we're going to have later on.

3 But before us now is the Plaintiffs' motion for class
4 certification. And so let me start with a couple of
5 observations. The first one is the procedural one.

6 There was a motion to strike filed by the Plaintiffs
7 because of what it feels is a late introduction of evidence,
8 including the 17 contracts that weren't produced until shortly
9 before the -- I think the opposition was filed. And the
10 McCrary declaration and then charts as being sort of excessive
11 add-on pages to the brief.

12 I'm not bothered by the charts. And, and, you know, so
13 I'm going -- I'm not going to strike that. Nor am I going to
14 strike the documentary evidence. The motion to strike under
15 Rule -- Local Rule 7-3(c) really should be filed with a reply,
16 and not just days before the hearing. So it, itself, has a
17 timeliness issue.

18 But perhaps more importantly, there's been no suggestion,
19 that I understand, that 17 specimens of contracts are somehow
20 not authentic or inaccurate or something that's not -- whose
21 authenticity is to be questioned.

22 If, for some reason, you -- there's some other evidence
23 that you feel that you wanted to get in and weren't able to get
24 in because of the lateness of that, I guess I would hear what
25 it is and why you still need additional time. But I would

1 rather, frankly, deal with the contracts unless there's some
2 authenticity issues, and get into the merits of this question.
3 You know, the *Borello* question and everything else.

4 **MS. LISS-RIORDAN:** All right. Your Honor, as I'm
5 going to address in my argument, I don't really think the
6 difference -- the subtle differences in contracts are of any
7 relevance anyway, so it's not a huge concern for us.

8 Just procedurally, I was concerned about the fact that we
9 specifically requested in discovery all versions of the
10 contract. And a few were produced, including contracts that
11 were not tied to any of the named Plaintiffs.

12 I know Uber said in their response that they said they
13 were only producing for the named Plaintiffs. It's a little
14 concerning for them to withhold documents in discovery, and
15 then try to use them after not having --

16 **THE COURT:** I think that deserves --

17 **MS. LISS-RIORDAN:** And they didn't -- and they didn't
18 just produce the ones for the named Plaintiffs. At least --
19 we're trying to sort it through, but at least Exhibit B to the
20 Colman declaration appears to be a document they produced that
21 we can't tell whether it's tied to any of the Plaintiffs.

22 They also didn't supplement by even producing the later
23 versions of the documents that the named Plaintiffs had entered
24 into. We assumed we had everything.

25 And then also, I was particularly concerned that when I

1 questioned the 30(b)(6) deposition witness about had there been
2 variations to the contracts over the years, Uber's counsel
3 instructed him not to answer, based on attorney/client
4 privilege.

5 I don't see how a party can then use information they had
6 withheld under a claim of privilege, just then bring it out and
7 submit it in their briefing, or three days before their
8 briefing, weeks after we submitted our motion.

9 So even though --

10 (Reporter interruption)

11 **MS. LISS-RIORDAN:** Sorry.

12 Even though I'm not really that concerned about the
13 variations in the contract for reasons I'll get into,
14 procedurally I have deep concerns about what went on here, and
15 I wanted to bring it to the Court's attention.

16 **THE COURT:** Well, and I think it deserves some
17 explanation, why the late production.

18 And I tell you, I've read the deposition transcript. I
19 assume you have too, Mr. Boutrous.

20 **MR. BOUTROUS:** (Nods head)

21 **THE COURT:** And I don't want to put you in a
22 difficult situation, but I hope you don't endorse -- I assume
23 you do not endorse the behavior that I saw in that deposition
24 transcript by your prior counsel.

25 **MR. BOUTROUS:** Your Honor, I -- I'm not here to sort

1 of go back in time. We have -- we produced the 17 agreements
2 before the opposition.

3 And I think -- you know, we came in on the class
4 certification. I expected Ms. Liss-Riordan to ask for class
5 certification discovery. And so we weren't trying to hold back
6 anything. And I'm not going to endorse or -- we want to lay
7 everything on the table. And that's what we did when we filed
8 this.

9 And I think in a -- Ms. Liss-Riordan also had the
10 opportunity to depose the former CEO and the vice-president of
11 operations, Ryan Graves, after we produced these 17 agreements,
12 and asked no questions about those agreements.

13 And we -- I'll stand here and tell Your Honor, I want to
14 focus on those contracts. And we produced them. This has been
15 an unusual case. The Plaintiffs' side has not asked for
16 information on the class. Has not asked for -- tried to prove
17 their class claims with evidence. And so, I think that
18 contributed to some of this.

19 But we were up front; we produced them before the
20 opposition. There was a full opportunity to depose Mr. Graves
21 about it. We would have given any other information.

22 And so, that's our position. And the Court has to decide
23 whether there's class-wide commonality, and whether common
24 issues predominate. So, I think those licensing agreements
25 need to be considered.

1 **THE COURT:** Well, that's why I'm not going to strike
2 them, because -- partly because of timeliness issues, and
3 partly because there's no question that I've heard about their
4 authenticity, and they're clearly relevant.

5 But I do want to make it clear that going forward, I don't
6 want to see this kind of thing again.

7 **MR. BOUTROUS:** (Nods head)

8 **THE COURT:** You know, when -- I assume there was a
9 document request, and it should be responded to forthrightly.
10 And when there is a deposition, instructing a witness not to
11 answer on a -- frankly, a specious claim of work product is
12 just not acceptable.

13 So, had you brought a motion to compel or called me --
14 which is in my standing order, that the Court is available on
15 an expedited basis if you're in the middle of a deposition. Or
16 whoever -- if I assign a discovery judge to this, that would
17 have been dealt with very quickly. But, here we are.

18 **MR. BOUTROUS:** (Nods head)

19 **THE COURT:** And so I'm going to deny the motion to
20 strike, and want to get to the merits, because I think that's
21 what we all have to deal with here. This is significant and
22 complicated.

23 So let me just make one observation, so we're all on the
24 same page. Obviously, what was before us is not the merits of
25 this case, but whether the requisites of Rule 23(a) and in this

1 case (b)(3) with particular focus on commonality, typicality,
2 predominance -- being the main factors that you have all
3 briefed and argued about, not exclusively, but mainly --
4 whether those requisites are met.

5 So to make clear, it doesn't matter in whose favor, for
6 instance, a particular *Borello* factor points. It may favor one
7 side or the other. The key is whether the factors are
8 susceptible to common proof adjudicable on a class-wide basis,
9 and which ones are and which ones are not. And if there are
10 some that are and some that aren't, whether the predominance
11 requirements of (b)(3) are met.

12 So, you know, as you've seen in some of the other cases,
13 either the Judge or the parties zero in on whether it favors
14 employee or independent-contractor status, which conflates the
15 merits and confuses the merits with what is before us right
16 now.

17 Because it may be that there are factors, for instance,
18 that militate in favor of independent-contractor status, which
19 would be Uber's position, but suggest the propriety of class
20 treatment because there's a commonality that might -- for
21 instance, you know, the lack of control over schedules, as we
22 all know. The drivers could pick their own schedules.

23 Which leads me to the first question. That is: Is there
24 some tension or inconsistency for Uber to argue, as it has, and
25 I assume it will throughout this case, that every single driver

1 is an independent contractor, without exception, and yet, to
2 also say there's such material variations in the issues and in
3 the proof that it defies class certification?

4 And the Ninth Circuit, I think, has noted that
5 contradiction in a case, and so has a couple of district courts
6 when defendants argue that.

7 So, you tell me: How can you argue that everyone is an
8 independent contractor, it's clear, and yet there are
9 individual variables here that preclude class certification?

10 **MR. BOUTROUS:** Certainly, Your Honor. For several
11 reasons.

12 First, the Ninth Circuit in the *Wells Fargo* decision that
13 we cite, which was a wage-and-hour and classification case and
14 the *Vinoli* case, *Vinoli v. Countrywide* which was decided the
15 same day as the *Wells Fargo* case, and in the *Wang* decision that
16 we've cited in our brief, in all of those cases, the argument
17 was that the company had a policy of exempting or classifying
18 all its -- the workers in the same way.

19 And the plaintiffs argued, aha, there's commonality. That
20 the defendant at that point couldn't make the argument that no,
21 at least some of the employees in those cases were exempt or
22 should be classified in a certain way.

23 And the Ninth Circuit has consistently in all three of
24 those cases said that's exactly right. That even if there's a
25 uniform policy of classifying workers in a particular way, the

1 courts then need to go beyond that and see, employee by
2 employee, whether -- in those cases, whether they were
3 correctly classified. Because some might have been correctly
4 classified based on the nature of the work that the individual
5 employees were performing. And so, I think it's very similar
6 here.

7 And as the Court knows, in the summary judgment
8 proceedings, the Court rejected as a matter of law the broad
9 argument that no service was being provided, and then moved on
10 to the *Borello* factors.

11 And once we get to the *Borello* factors, I just don't think
12 there's any way a class can be certified, because there are 13
13 different factors. They do vary.

14 And I hear exactly what you're saying, Your Honor. When I
15 went back through this, I had the same reaction. It's like
16 keeping the merits and the class issues discrete, but there are
17 many factors that can't be proven on a class-wide basis. And
18 I'll come back to this when I get into my full-blown argument
19 here.

20 But, Plaintiffs didn't really even in their motion try to
21 show that the 13 secondary *Borello* factors could be -- they
22 didn't try at all.

23 **THE COURT:** So you're not taking the position that
24 when you look factor by factor under the *Borello* analysis now,
25 that as a matter of law, you would prevail.

1 **MR. BOUTROUS:** You know, temporarily, we've left all
2 that behind, Your Honor.

3 **THE COURT:** Oh, I see.

4 **MR. BOUTROUS:** We took the Court's ruling, and now
5 we're going with it. And this Court, and Judge Chhabria said
6 this, and *Borello* says this, that no one factor is dispositive;
7 you have to look at all the of the factors together. And there
8 are factors you simply cannot decide in one fell swoop across
9 the class. And that's not all inconsistent with what we were
10 arguing before.

11 Now, I should put this on the record: That if the Court
12 certified a class of 160,000 or any other kind of class, I
13 think we have really strong arguments that we would win because
14 Plaintiffs have put -- taken all their chips and pushed them
15 onto one square, then they say that the right to control and
16 the right to terminate is the singular factor to look at. And
17 as this Court noted explicitly, that's wrong.

18 So they've staked their class certification, Your Honor,
19 on a completely incorrect legal theory that's inconsistent with
20 the summary-judgment order, that's inconsistent with *Borello*,
21 with *Ayala*, with all of the cases.

22 So if there is a class certified -- and again, I was going
23 to make this point later, but I'll make it now -- there's
24 always this assumption that the class is going to win. That's
25 not, I think, something that should be assumed here that -- if

1 the Court certifies a class. But, going back to the class
2 certification issues -- and I can do it now --

3 **THE COURT:** Well, I mean, that leads to my next
4 question I was going to ask. If you're that confident on the
5 *Borello* factors, wouldn't it be to Uber's benefit to get a
6 class-wide ruling and class-wide adjudication that drivers are
7 independent contractors, rather than drivers -- rather than
8 employees?

9 **MR. BOUTROUS:** Well, first, Your Honor, just to back
10 up, and maybe -- do you mind if I turn my slides on? Because I
11 have a couple of slides on this very point.

12 **THE COURT:** Go ahead.

13 **MR. BOUTROUS:** If my colleagues could flick that on,
14 and -- I'll turn this on.

15 (Document displayed)

16 **MR. BOUTROUS:** Because the first predicate, rather
17 than looking at it from Uber's perspective, I want to start
18 with what I think is a fundamental problem with this class
19 action, Your Honor. And it's that the Plaintiffs are
20 inadequate representatives.

21 Here, this first slide has just a few quotes from the
22 driver declarations that we submitted. We submitted 400 of
23 them. And we have driver after driver saying they don't want
24 to be classified as independent contractors. And that they
25 like the independence; they like the flexibility; they like the

1 autonomy. They don't want to be classified as employees.

2 That is highly relevant here --

3 (Document displayed)

4 **MR. BOUTROUS:** -- because Plaintiffs in their
5 brief -- and I thought this was a pretty remarkable
6 statement -- said the drivers' desires are "legally
7 irrelevant."

8 "Whether the drivers want to be classified as
9 independent contractors is legally irrelevant."

10 That has significant ramifications, Your Honor. First of
11 all, they are seeking a result, the three named Plaintiffs here
12 and Plaintiffs' would-be class counsel, that is diametrically
13 opposed to the desires of the people they seek to represent.

14 **THE COURT:** Let's break that down. So first of all,
15 you have gathered 400 declarations, which sounds impressive
16 except that when you measure that against 160,000 class
17 members, that comes out to 0.250 percent. Not even 1 percent.
18 So, how probative is that? Maybe it's probative; I don't know.

19 It would be more probative if it were done on a truly
20 random sampling, double-blind study and everything else. I
21 don't get the impression when I read the declaration it was
22 done in that fashion. So, I don't know how probative it is.

23 They claim they have thousands of -- they've been
24 contacted by thousands on the other side. So, I'm not sure
25 what that means. But there's a bigger point, and that is -- it

1 may be relevant, I'm not necessarily going to say it is
2 irrelevant, but a series of questions cases have said you
3 cannot allow sort of naysayers and -- and a group of potential
4 class members who object necessarily control the situation.
5 Because you're always -- in a large class, you're always going
6 to get some people who don't agree with it. And yet, there are
7 policy reasons.

8 I mean, you know, here, there are public interests behind
9 the Labor Code enforcement that transcend any individual views.
10 There's also the context of some of these codes are here to
11 ensure fair competition between corporations, so one is not
12 getting the advantages of low wages and not following the wage
13 laws vis-à-vis company versus another.

14 So there's lots of interests involved that suggest that
15 you cannot allow a group of what some people call happy camper,
16 you know, declarants to control. Not to say it's totally
17 irrelevant, but how relevant and how probative in this case?
18 Because these were not scientifically selected, I gather, on a
19 random-sampling basis.

20 **MR. BOUTROUS:** Let me address that, Your Honor.
21 Because first of all, if I were the Plaintiff's counsel -- and
22 I guess I'm pretending, sort of in a Plaintiffs' position here
23 physically -- then I think that the numbers might be more
24 relevant.

25 Plaintiffs have three people. Three named Plaintiffs.

1 They didn't bother to try to find out what anyone else desired.
2 And, 400 is a significant amount. We had people lined up out
3 the door coming in who wanted to express their views on these
4 things.

5 And to call them "happy" -- this wasn't the Court's words.
6 Plaintiff called them "happy camper declarations."

7 One, that's condescending. These are hard-working
8 entrepreneurial businesspeople. A doctor; a scientist; an
9 entrepreneur mom, she called herself. So these are adult
10 businesspeople, sophisticated businesspeople. People who are
11 trying to make a living. And this case is going to have a
12 significant effect on their lives. And they submitted sworn
13 testimony.

14 And these aren't -- the happy camper declarations the
15 Plaintiffs pointed to are the kind of form declarations you
16 sometimes see. And I don't know if the Court's had a chance to
17 go through these declarations. They're detailed, and they're
18 different. And they tell different stories.

19 **THE COURT:** Let me ask you a question. I just pulled
20 one randomly, Gebriel Kidany, who likes the flexible driving
21 schedule, and that's why he or she is driving for Uber.

22 (Document displayed)

23 **THE COURT:** And has a newborn baby, and doesn't want
24 to -- while it likes being an independent contractor, because
25 "I decide when I get to work."

1 Well, was this person told that if the Plaintiffs prevail
2 and, for instance, got a judicial adjudication or verdict
3 adjudication that they were employee status, that that would
4 necessarily change the whole structure? That there would no
5 longer be flexibility? And how do we know that that's the
6 case?

7 **MR. BOUTROUS:** Well, we did submit the actual
8 scripts, Your Honor, with our surrepley, that will be used in
9 informing the individuals what the consequences could be.

10 **THE COURT:** And one thing that was missing, it didn't
11 say that: Well, we don't know whether the actual structure
12 will change. That: If we lose this case -- well, one thing,
13 were they told that they would probably get a few thousand
14 bucks? Sometimes that makes a difference to people.

15 **MR. BOUTROUS:** We did tell them that they could get,
16 potentially, expenses reimbursed as part. So that was
17 disclosed.

18 **THE COURT:** And, and if they win the tip thing, you
19 know, if you do the calculation depending on the percentage and
20 all that, I don't know what that comes to per person, but
21 usually when we have class notice we usually try to put dollar
22 amounts in there so people can really make that -- but I didn't
23 see that here.

24 Nor -- nor was there any basis, did I see, for assuming
25 that they would lose this flexibility.

1 **MR. BOUTROUS:** Well, Your Honor, we think that the
2 control that would be required to be exerted if they were all
3 deemed employees would require much more rigid scheduling in
4 order to meet demand, in order to make sure enough drivers were
5 on duty at particular moments. To ensure that workers' comp
6 laws, the meal and rest break laws were adhered to.

7 So we -- we respectfully submit that the business model
8 would have to change, and there would be rigid schedules. And
9 this autonomy and flexibility couldn't exist. And so that is,
10 we believe, what -- a serious, serious issue.

11 And since the Court selected a declaration, let me just --
12 just compare.

13 I'll wait until you're done taking notes.

14 **THE COURT:** Yep. Okay.

15 **MR. BOUTROUS:** So -- and so I did a comparison of the
16 named Plaintiffs. So here's Mr. Colopy, who drives through a
17 limousine company, so he works for another company. He doesn't
18 pay for all his expenses associated with driving. And he
19 believes Uber controls him in an employer-employee
20 relationship.

21 He is asking to represent Mark Forester, who is the CEO
22 and owner of his own company. He has 34 employee drivers who
23 operate a fleet of 12 vehicles. They cover all expenses. And
24 he says (As read):

25 "Uber does not control -- does not have a right to

1 control the way my partners and I operate."

2 He had full knowledge of what the lawsuit would be. He
3 would be a class member. He doesn't want Mr. Colopy to
4 represent him. And Mr. Colopy's interests are directly
5 antagonistic to him.

6 And I think -- again, I -- it's extraordinary to have
7 these kind of declarations in a class action from the
8 individuals who would potentially be in the class.

9 And it's different than other cases, Your Honor, where the
10 claim goes to something that is integral to why they like the
11 working, using the app. You really don't see that. And this
12 goes to a key legal question.

13 (Document displayed)

14 **MR. BOUTROUS:** In *Amchem*, the Supreme Court said that
15 the adequacy analysis looks to ferret out whether there are
16 conflicts between the objectives of the named class members and
17 the absent class members.

18 The Supreme Court in the *Walmart versus Dukes* case said
19 the named plaintiffs have to have the same interest and the
20 same injury as the people they seek to represent. In *Borello*,
21 the court said that it's significant if the -- if the
22 individuals agree to, expressly or implicitly, to be
23 independent contractors.

24 So this is a crucial issue both for conflict purposes, but
25 then when we get to the commonality point --

1 **THE COURT:** So any time you have a large class of
2 100,000 people, and you have a number of people who, for
3 whatever reason, don't agree with the objectives or the tactics
4 of the plaintiff, does that suggest that you can never certify
5 a class?

6 **MR. BOUTROUS:** No, Your Honor. This is a different
7 kind of case.

8 **THE COURT:** Where do you draw the line? Why? Why so
9 different here?

10 **MR. BOUTROUS:** Well, here, because it goes directly
11 to the nature of the work and the relationship. It will
12 eliminate --

13 **THE COURT:** But it is contingent, as you put it, on
14 their understanding of what the consequences would be of a
15 victory on the part of the Plaintiff, a loss on the part of
16 Uber at the end of this case, if that should happen, that there
17 would be a definite change. They would no longer be able to
18 choose to work part-time, for instance. Flexibility.

19 How do we know that's true?

20 **MR. BOUTROUS:** Well, first, I don't think every
21 declarant was thinking in particular with respect to specifics.
22 So, I mentioned Mr. Forester. He's an independent
23 businessperson. He has a business. He doesn't want to
24 suddenly be deemed an employee of another company. And he
25 doesn't want to have the potential for someone to be deemed his

1 employer.

2 And, and so, again, I don't think it can possibly be
3 discounted that people say they like the way the system
4 functions --

5 **THE COURT:** Except they could be under a
6 misunderstanding that once you get the label "employee" the
7 actual structure of the relationship changes. In a way, it's
8 the opposite. This case is about: You take a certain
9 structure, and we're trying to put a name on it. Is it one, or
10 is it the other?

11 Now, you say it may have collateral consequences down the
12 line because once that label's put on it, the company then has
13 to respond, because it has other obligations, and now it can't
14 quite be so -- but I mean, it's also conceivable that a lot of
15 these folks just think: Oh, suddenly I'm an employee, I'm
16 going to be called at, you know, 8:00 in the morning and told
17 to get down here right now, and that sort of thing.

18 And that -- that may be a false assumption.

19 **MR. BOUTROUS:** Well, I think, Your Honor, the fact
20 that individuals feel that they are independent, they can --
21 they can work when they want to, drive where they want to, they
22 don't have a boss telling them what to do, those are things
23 that everyone understands.

24 If people -- the named Plaintiffs don't really seem to
25 understand the distinction.

1 (Document displayed)

2 **MR. BOUTROUS:** We can't have a class with
3 Mr. Gurfinkel, who said he wants to be an employee, but he
4 thinks an employee and an independent contractor are the same
5 thing. He's going to represent 160,000 people where he's
6 trying to get them deemed employees, without really knowing
7 what that means. So it cuts both ways here.

8 And for the Court, the role, as you know, is to say: Can
9 these three individuals stand as representatives, stand in the
10 shoes, in the words of the Supreme Court in *Hansberry versus*
11 *Lee*, and represent everyone?

12 How can they, if most of the class members -- and
13 Your Honor, I repeat, there's no declarations from people who
14 say -- who support what the Plaintiffs are saying, that say:
15 We want to be employees, and the like. There's nothing like
16 that.

17 And so Mr. Gurfinkel, he wants to be an employee, but he
18 doesn't really think it makes any difference. Mr. Martinez,
19 who I compared him with here, said he wouldn't want to be an
20 Uber employee. He would quit, "if they tried to make me an
21 employee." He values his freedom and independent-contractor
22 status too much. And I think we have to take him at his word.
23 He swore to that under oath. And we have driver after driver
24 saying that.

25 And I understand what the Court is saying about policy

1 reasons, but taken in the typical case, here, any ruling -- and
2 Plaintiffs' counsel stated that in the reply brief -- any
3 ruling in a class, even if people opt out of the class, will
4 have -- will change their status. If there was a class ruling
5 and a declaration and an injunction that drivers are
6 independent contractors, Plaintiffs' position is that would
7 affect everybody. Even if they opted out of the class.

8 So it's an illusory opt-out right. It is very much like
9 *Amchem*, where the Supreme Court said that there -- it was an
10 asbestos case, and it was a settlement case -- that the
11 interests of the named plaintiffs weren't taking into account
12 the desires and objectives of other people who had different
13 objectives.

14 And I think, Your Honor, out of the starting gate, that
15 precludes class-action status.

16 **THE COURT:** All right. Let me hear from
17 Ms. Liss-Riordan, your response. And particularly, why
18 there's -- or at least it's asserted there's nothing in the
19 record to show any kind of mass support for the position your
20 three named Plaintiffs are taking.

21 **MS. LISS-RIORDAN:** Well, Your Honor, first off, I
22 want to reiterate what you have already pointed out. In every
23 single case of this nature that we do -- and I litigate a lot
24 of independent contractor classification cases -- we get
25 flooded with happy-camper declarations from the defendant,

1 saying everyone likes the system. In wage-and-hour cases in
2 general, we're seeing them. But in independent contractor
3 cases, in particular. And I want to point out that in the
4 *Alexander* litigation, Fed Ex submitted plenty of those, as
5 Ms. Ross could tell you.

6 And the Supreme Court in a number of cases have made
7 clear, as you were pointing out: It's not -- this isn't a
8 popularity contest. It's not a question of what people want.

9 The *Susan and Tony Alamo Foundation* has some really strong
10 language in there about people who said -- I believe there's
11 some strong language about: "It would pierce my soul to be
12 paid for this work; I want to volunteer." And the court says
13 that doesn't matter.

14 In the First Circuit, the *Martin versus Tango's Restaurant*
15 case, there was an employee who took the employer's side, and
16 even testified as an employer witness at the trial.
17 Nevertheless, the Court deemed that he was entitled to
18 overtime, and awarded him overtime as a, quote, involuntary
19 plaintiff, noting the concerns that you noted, that the wage
20 laws are not just to protect the workers but also complying
21 competitors, and other societal policy reasons.

22 The *Matamoros versus Starbucks* case was a case in which
23 the defendant submitted reams of declarations from class
24 members, putative class members who said they liked the system;
25 they didn't want to change the system. They had no desire to

1 change the system. The First Circuit said it's irrelevant.
2 And besides, they can opt out if they don't want to have the
3 psychic harm of having been a part of the case that -- that
4 changed the system.

5 So, we didn't see -- Uber submitted 400 declarations out
6 of a purported class of 160,000. Like you observed, we saw
7 that as a minuscule portion, not even a random sampling, and
8 didn't really know what relevance it had. We didn't want to
9 play a game of who can produce a bigger stack of declarations.

10 We could have. I submitted a declaration from our
11 paralegal who has personally spoken to hundreds of drivers.
12 1,700 by our last count have contacted our lawyer firm from
13 around the country, supporting the case and wanting to know how
14 they can be involved in the case.

15 (Reporter interruption)

16 **MS. LISS-RIORDAN:** More than half of them are from
17 California.

18 I do have case law supporting the fact that such a
19 declaration is admissible. But for some reason, I seem to have
20 misplaced it. So I can cite that for you in a moment.

21 For class certification purposes, the Court can take a
22 look at -- I'm sorry; I do have it. For class certification
23 purposes -- again, we don't really believe this has much
24 relevance, which is why I didn't spend a lot of time on it, but
25 I did put in the Lopez declaration just to make the point.

1 One case, *Turner versus Murphy Oil*, 234 FRD 597, the court
2 considered affidavit from the counsel saying how many clients
3 they represented, which the court looked at just for the
4 purpose of seeing that plaintiffs' counsel would vigorously
5 pursue the case.

6 There are other cases we have noted where evidence
7 submitted on the issue of class certification doesn't need to
8 be strictly admissible under the rules of evidence. It's not
9 going to be admitted at trial. But that doesn't matter.

10 I'll just read off to you a couple more cites.

11 (Reporter interruption)

12 **MS. LISS-RIORDAN:** I apologize. *Hayden versus*
13 *Freightcar Am*, 2008, Westlaw, 375762.

14 Anyway, those are just a couple of examples. So, again,
15 because this isn't a popularity contest, I wanted to focus on
16 what we thought was the relevant issues.

17 And rather than trying to come up with a stack of 401
18 declarations, I didn't think that was really worth our time. I
19 don't think it's legally relevant --

20 **THE COURT:** Other than the legal irrelevance of it
21 and the admissibility of the paralegal declaration, do you have
22 any other --

23 **MS. LISS-RIORDAN:** Well, we did submit a number of
24 declarations in opposition to Uber's motion for summary
25 judgment. Presumably, drivers would only cooperate with us and

1 submit those declaration if they wanted to support the case.
2 So there is evidence in the record in this case that it's not
3 just these three drivers who were seeking the result that we're
4 seeking.

5 And in addition, we did submit declarations from a handful
6 of the drivers who submitted the declarations in favor of Uber,
7 who -- who said that they didn't realize that if the case was
8 successful, they could be reimbursed for expenses. They'd like
9 to be reimbursed for expenses, should they have a legal right
10 to do so.

11 So I think those declarations undermine a bit -- I
12 understand they submitted a script saying what everyone was
13 told, but our paralegal, as submitted in her affidavit, talked
14 to about 50 of the drivers who submitted the 400 declarations,
15 and found that most of them wanted to be reimbursed for their
16 expenses, didn't understand what the case was about from their
17 discussions with Uber. But most of them were afraid to put
18 their name on a document supporting the Plaintiffs in this
19 case.

20 And, courts have looked at issues like that in weighing
21 class certification. *Overka versus American Airlines* is one,
22 is a case that comes to mind where the court noted and cited
23 cases that the risk of reprisal in an employment relationship
24 is a factor weighing in support of class certification.
25 Because when you have people who are dependent financially on a

1 party, they're going to be hesitant to put their names out
2 there. And that's one of the purposes of a class action.

3 So, that responds to that point.

4 **THE COURT:** All right. What I would like to do is go
5 to a number of issues that I think are, frankly, more
6 important. And the first thing we should look at is the right
7 of control as it may be affected, variously or not variously,
8 by the 17 contracts.

9 And what I want to ask is not: What was the actual
10 exercise of control? I know it varies from, it may vary from
11 place to place. The training may vary. The actual rules may
12 vary in terms of when you can turn it on and turn it off or use
13 another app, exactly what you have to -- what you're told when
14 you first go on, et cetera.

15 But it's the right to control, as we know from *Borello* and
16 especially the *Ayala* case, which I will say is quite important
17 since it's recent and it looks at this issue, and it's very
18 parallel to us.

19 In looking at the 17 contracts, where are the substantial
20 material differences in restricting or restraining Uber's right
21 to control?

22 So I'm not -- I understand that there are differences in
23 actually how it has played out from time to time.

24 **MR. BOUTROUS:** Uh-huh.

25 **THE COURT:** But, one place to look at is the

1 contract.

2 **MR. BOUTROUS:** (Nods head)

3 **THE COURT:** There are a lot of things that seem to be
4 allowed by the contract that Uber can do. Such as the
5 selections. You know, it sets forth selection criteria. Who
6 can drive, for instance. It's not apparent to me that Uber's
7 restricted from adding restrictions or subtracting restrictions
8 from that. I would imagine, would want do that over time.

9 Coming up with rules. I mean, we had in the
10 summary-judgment context, there were allegedly -- and maybe
11 these were dated, but there were rules from time to time,
12 suggestions, manuals, training things, bulletins about what
13 radio stations to play, and how to greet people, and bottles of
14 water, et cetera, et cetera.

15 Was there anything that restricts or restrains Uber's
16 exercise of that, should it choose in the future to have rules,
17 or change rules, or add or subtract rules?

18 Enforcement of the five-star feedback mechanism. That's
19 alluded to, and there's -- it's stated variously in terms of
20 what the consequences could be, but not very clear.

21 But again, are there restriction on the right of control
22 in Uber's administration, for instance, of feedback? Could it
23 come up? Is there anything that prohibits it from coming up
24 with a more specific standard, that you have to maintain at
25 least X stars for a certain number of months; or if you go

1 below a certain number of stars, you're going to be presumed to
2 be in deep water and that kind of thing?

3 (Off-the-Record discussion between the Court and Clerk)

4 **THE COURT:** All right. Well, why don't I do this.
5 Why don't I leave you with that thought; give you a break.

6 So, I'd like to know where specifically in the contracts
7 you think there are differences in terms of restraining Uber's
8 right to control. And, that's the starting point.

9 **MR. BOUTROUS:** Perfect, Your Honor.

10 **THE COURT:** Okay.

11 **MR. BOUTROUS:** Sure. How long should we break for?

12 **THE COURT:** Fifteen.

13 **MR. BOUTROUS:** Thank you.

14 **THE CLERK:** Court is in recess.

15 (Recess taken from 3:10 to 3:27 p.m.)

16 **THE CLERK:** Court resume.

17 **THE COURT:** Okay. A question was pending. Do you
18 have the question?

19 **MR. BOUTROUS:** Yes, Your Honor. Let me, if I may,
20 just set up my answer with a quick -- as you mentioned, the
21 *Ayala* case, just to start with square one and work to this
22 control point, because I think it really is important.

23 (Document displayed)

24 **MR. BOUTROUS:** As I mentioned earlier, this Court in
25 summary judgment noted that under *Borello*, no single factor is

1 dispositive. And that the control factor was not dispositive.
2 And *Borello* makes clear that it can't be a rigid focus on the
3 right to control.

4 The Plaintiffs in their class certification motion have
5 run away from that ruling that the Court made. And you'll see.
6 I think Ms. Liss-Riordan gave you her trial plan, which asks
7 the Court to go back to the notion that the Court should just
8 decide these issues, as a matter of law. It's in the first
9 page of the trial plan.

10 **MS. LISS-RIORDAN:** I actually haven't handed it up
11 because I haven't gotten to do my argument yet. But it will be
12 coming.

13 **MR. BOUTROUS:** Sorry, sorry. We'll get to you in a
14 minute.

15 But, so the argument in the class certification motion,
16 Your Honor, that we were responding to was that right to
17 control and the right to terminate were the singular -- of
18 singular importance and the most important. And none of the
19 other *Borello* factors were even mentioned. In fact, *Borello*,
20 itself, isn't even cited in the opening motion for class
21 certification.

22 (Document displayed)

23 **MR. BOUTROUS:** And again, *Borello* says you can't
24 focus simply on the right of control. You have to look at all
25 the factors, and it can't be a rigid analysis.

1 And *Ayala* -- and this is what I really wanted to get to,
2 Your Honor. If one reads the class certification brief, it
3 sounds a lot like *Ayala* ruled that the class could be certified
4 in that case, and ruled that the right of control was
5 essentially dispositive.

6 It doesn't say that. In fact, it reversed and remanded
7 for reconsideration of whether there were predominant
8 individual issues, including based on the other *Borello*
9 factors, the secondary factors. And really, this Court --
10 Your Honor presaged the determination: That you don't just
11 look at the agreements --

12 **THE COURT:** We're going to go through those factors
13 because I have a little table, and I want you to tell me --

14 **MR. BOUTROUS:** Good.

15 **THE COURT:** -- whether you disagree that they're
16 common or not.

17 **MS. LISS-RIORDAN:** (Indicating)

18 **THE COURT:** But nonetheless, although perhaps not
19 dispositive, every case that says the first thing you look to,
20 and the fundamental question, most important question is right
21 to control.

22 **MR. BOUTROUS:** That's true. You start with that.
23 But it's not the stopping point.

24 In fact, I was just going to say this Court in *Harris*,
25 before *Ayala*, said: But you also look to what's actually

1 happening, how the right is exercised, in order to determine
2 what the right is. It's the right of control; that's what
3 *Ayala* held is crucial.

4 But as this Court held, and *Ayala* made it too, that you
5 then have to look at the actual course of conduct to determine
6 what the right of control is. So, that, I wanted to just tee
7 that up, and then go --

8 (Document displayed)

9 **THE COURT:** Though I will say that the *Harris*
10 decision pre-dated *Ayala*, *Ayala* added some clarity about that.

11 I know there's an interplay between actual exercise and
12 right of control, and it can go in either direction. The
13 actual exercise can exceed what the contract looks like; that
14 suggests a greater range of right of control. Or a consistent
15 practice below that may presage or indicate an accession of
16 that -- you know.

17 But, you do start with right of control. And the logical
18 point to start is the contracts.

19 **MR. BOUTROUS:** Exactly. And I'm going to get right
20 there. But again, you had it pretty close, Your Honor, in
21 *Harris*, that: You look and see how it's exercised as part of
22 the inquiry.

23 (Document displayed)

24 **MR. BOUTROUS:** So let me go to the contracts. We've
25 submitted this chart -- I have it up on the screen -- that

1 walks through some of the differences. And I think the Court
2 was asking a corollary question to this as well.

3 But first, there are 17 different agreements that are in
4 play here. The current agreement; plus the driver addenda that
5 were signed, the four of those by various drivers; plus the
6 other agreements that existed going back to 2009. That's a
7 fact. We can't get around it.

8 Even if Uber were today to change the agreement completely
9 again, which, the Court was I think asking about its power to
10 change the agreements, these -- all these agreements are in
11 play in this case because the class would be 160,000 current
12 and former people who have used the Uber app.

13 There are many different variations that would have to be
14 considered here that go to the right of control. First, two of
15 the agreements, the first two, would only allow termination for
16 cause. Plaintiff has said the most important factor -- really,
17 the dispositive factor, if I'm reading their brief correctly --
18 is whether there's a right to terminate at will. I don't
19 necessarily agree with it, but that's their position.

20 So two of the agreements that class members in this case,
21 if there was a class signed, does not provide for that
22 termination at will of the licensing agreement.

23 **THE COURT:** Are you talking about those that are
24 Exhibits A and B to the Colman declaration?

25 **MR. BOUTROUS:** Yes. Well, actually -- I can figure

1 out exactly which agreements those are, Your Honor. Let me
2 just take a look at my chart here.

3 Your Honor, if it would be helpful, I can just annotate,
4 give you an annotated chart which ties the chart directly to
5 those -- those exhibits. So you can just walk through each
6 contract. I don't have it up on the chart which Colman
7 exhibits they tie to.

8 **THE COURT:** Well, I noted when I went through
9 these -- and I did go through these, and I'll just tell you my
10 summaries -- that a lot of them have terms that say either
11 party can terminate without cause with seven-day notice or
12 30-day notice.

13 **MR. BOUTROUS:** Uh-huh.

14 **THE COURT:** There are a lot of them that have the:
15 In its sole discretion, "we can prohibit people from using the
16 app, the service. Or, if you don't meet certain standards, but
17 in our sole discretion..." which sort of sounds like although
18 there's sort of criteria out there, it's unreviewable
19 discretion should Uber decide, well, you didn't comply, or you
20 don't meet the standard.

21 And so -- and then there are some just straight sole
22 discretion. For instance (As read):

23 "The company will have the right at all times in the
24 company's sole discretion to prohibit or otherwise
25 restrict you or your personnel from accessing the

1 service for any reason."

2 That's Exhibit F, which is just a Transportation Provider
3 Service Agreement, Page 7. I just, you know, pulled that one
4 out.

5 But there -- there are those, and there are some other
6 ones that say -- well, similarly, Exhibit D -- C to the
7 declaration, again, Transportation Provider Service
8 Agreement -- has that same language that in its sole discretion
9 they can prohibit you or any of your -- you know, people,
10 personnel, from accessing the service for any reason.

11 So you have that. And then you have a couple that say
12 nothing.

13 **MR. BOUTROUS:** Correct.

14 **THE COURT:** And that's where it seems to me that the
15 default generally, if it says nothing, is whether it's an
16 independent contract or an employee contract, I think the
17 presumption is that it's at will. Because you don't imply a
18 for-cause requirement unless there's an implied duty of good
19 faith that's resulting from some conduct or something else.

20 I mean, that's a general rule.

21 **MR. BOUTROUS:** Well, Your Honor, just to back up, I
22 think the way you've just outlined it shows the various
23 differences. That we have the different language. We have --

24 **THE COURT:** Well, the language may be different, but
25 the outcome's the same. It seems to me that Uber has the right

1 in every single contract I saw, whether by right of common law,
2 as a default from silence or an express provision that says:
3 Terminate on seven days notice, or: In our sole discretion we
4 can terminate. Some: We can terminate in our sole discretion
5 based on these criteria, but again, in our sole discretion.

6 The language -- and sometimes there's several within the
7 contract. They're not always consistent internally. But every
8 one of them has enabled Uber to terminate without cause.
9 That's how I see it.

10 **MR. BOUTROUS:** You know, I'm not sure that just here
11 in a class certification hearing I could say that the
12 agreements that don't say -- we don't know. Right? That would
13 be something we would have to have a trial over: Do the
14 agreements that don't say anything, do those allow for at-will
15 termination? That would be something on the merits for a
16 trial.

17 With respect to the agreements that include a mutual right
18 to terminate, your colleague Judge Orrick in the *Hennighan* case
19 said that that mutual termination clause is evidence of an
20 independent contractor relationship. So --

21 **THE COURT:** Well, see, that's an interesting
22 question. Because in many situations that may be true, but in
23 an employment case, because of the Thirteenth Amendment, it's
24 always -- an employee can always walk away, and can never be
25 bound -- I mean, I guess he could be bound by damages or

1 something. But I mean, presumptively, an employee can always
2 quit.

3 So, what looks like a mutual -- even if it's unilateral,
4 it's actually mutual. I don't know if there's any difference,
5 in the employment context.

6 **MR. BOUTROUS:** I think, Your Honor, that assumes the
7 answer to the entire case, that this is an employment context.
8 And Judge Orrick in *Hennighan* -- that was a *Borello* case
9 classifying whether somebody was an independent contractor or
10 employment.

11 And this isn't unusual. This isn't like a contract of
12 employment. It's a licensing agreement. And so this
13 termination provision -- I think you have to look at the actual
14 circumstances of how it plays out, because I think both you and
15 Judge Chhabria recognize some of these factors don't quite fit.

16 This is a software licensing agreement. And the company
17 can deactivate the licensing agreement, or a driver can stop
18 using it or pull out, and say, "I want to use some other
19 process." So it's very different.

20 But to say -- and this is Plaintiffs' argument -- that
21 well, with employees, you can always quit, therefore that's the
22 end of the story, that's the question.

23 And other courts -- and Judge Orrick cited them in the
24 *Hennighan* case -- say that at best, it cuts both ways, but it
25 can support a finding of an independent contractor

1 relationship. You contract with a plumber or someone, and they
2 can say, you know: I'm done; I don't want to work for you.
3 And vice-versa.

4 So, we have differences on the right -- on the right to
5 terminate amongst the contracts.

6 **THE COURT:** Is there some kind of sanction in these
7 -- the ones that there's not a mutual right to walk away on
8 seven days' notice, for instance, do these contracts where it
9 looks like only a unilateral right, not a mutual right, is
10 there a consequence if the driver says: I've had it, I don't
11 want to do this anymore?

12 **MR. BOUTROUS:** I don't believe there's an express
13 provision, Your Honor. But under breach-of-contract
14 provisions, if it was an independent contractor, and the
15 independent contractor walked away on his or her own volition,
16 then you would have the right to bring a breach-of-contract
17 case if you could show that there were damages.

18 So I think, as you mentioned at the outset, if we sort of
19 keep the focus -- how would we have a trial with all these
20 contracts? We'd have to figure out what they meant, and what
21 they meant in terms of control over individual drivers.

22 And I think it would be a complete -- completely
23 impossible task to do it in a fair way where Uber was allowed
24 to put on its defenses as the *Walmart versus Dukes* case says it
25 has a right to do, to show that individual who signed the very

1 first contracts that don't have a termination-at-will
2 provision, what their situation was, and walking through them.

3 The other one, Your Honor, I think it's very important:
4 Five of the agreements on the chart (Indicating) prohibit
5 drivers from running Uber's competitors' applications and
6 displaying their insignia. The other 12 agreements do not
7 prohibit drivers from doing so.

8 Not being able to have individuals work for other people
9 while they are working for you is very much a relevant question
10 as to lack of control over those individuals.

11 **THE COURT:** Don't those -- I thought those provisions
12 say under -- at certain times. Can you point me to one that
13 says you can never run an app --

14 **MR. BOUTROUS:** My colleague perhaps will hand me --
15 oh, I think we gave your clerk our set. Sorry about that.

16 Thank you.

17 We'll show you an example, Your Honor.

18 **THE COURT:** I thought the differences were some said
19 you can't have them both on, and others say while you're
20 actually performing a service, you can't have it on. I didn't
21 know there were some that says you can't use --

22 **MR. BOUTROUS:** I believe there is, Your Honor. And
23 even the ones, though, that say you can't have it on differ
24 from the ones that don't preclude you from doing that.

25 And so again, for purposes of common issues and on

1 control, some of them don't include that restriction, and many
2 drivers do it. In fact, our declaration showed that many of
3 them keep both on at the same time. And imagine, as an
4 employer, if your employee could say: Well, I'm going to go
5 with -- to this other employer.

6 That's why this duty-of-loyalty issue we raised is so
7 important. That if they're employees, they couldn't be serving
8 two employers simultaneously while they're driving down the
9 street, and then choose one over the other, based on their own
10 discretion. That would violate basic duty of loyalty that an
11 employee owes to their employer.

12 And so those differences --

13 **THE COURT:** Is that true? I mean, somebody who
14 performs some kind of service, and let's say they do it with
15 enough control that -- whether they're doing housekeeping work
16 or maintenance work or yard work or something, can't decide
17 when they get two calls, which one to go to?

18 **MR. BOUTROUS:** Well, if they were employees, and it
19 was a competitor. That -- here, we're talking about a
20 competitor -- let's say it's Lyft. If an individual can be in
21 their car and have a potential fare and decide they're going to
22 go drive for a competitor, that raises, really, if you're an
23 employee, real duty-of-loyalty issues.

24 I think, you know, if you look at it from the perspective
25 of, say, a journalist who -- let's say they were employees, an

1 employee of both the *San Francisco Chronicle* and the
2 *Los Angeles Times*. And they get a really great story that
3 comes in. Their duty of loyalty to each of those companies
4 would -- publications would preclude them from favoring one
5 over the other. They have a duty --

6 **THE COURT:** But if you follow some of the contracts,
7 some of the contract restrictions I saw, as long as you're in
8 the middle of giving somebody a ride and responding to a
9 request you can't, you know, work for somebody else. But once
10 you're through with that, you can turn off your app and take up
11 the Lyft phone and respond to that one.

12 Does that reach -- that suddenly becomes an unlawful act
13 if they're deemed employees, if they're labeled an employee, as
14 opposed to an independent contractor?

15 **MR. BOUTROUS:** I think, again, to work for a
16 competitor, if you're an employer -- employers would not
17 tolerate that, Your Honor. And, kind of goes back to the
18 point, as well, that: Which employer would want to have an
19 employee who they could not tell when to come to work, what to
20 do at work, how long to work, what days to report? It's the
21 opposite of the employer/employee relationship.

22 But here, these factors, I think, go the fact that we have
23 differences in the contract. The other contracts don't even
24 preclude simultaneous running of the apps. So I think those
25 factors really go to this question of the variability among the

1 contracts.

2 And it's complicated. You know, if you go through each of
3 the contracts, as the contracts evolve, how can we have that
4 decided all in one case? I just don't think it's possible.

5 **THE COURT:** Let me hear your response. Show me a
6 contract that says that you can never use someone else's app.
7 Is there such a contract?

8 **MR. BOUTROUS:** And Your Honor, just looking at the --
9 you know, the examples, the paragraph, it -- it does tie it to
10 the simultaneous running of the app.

11 **THE COURT:** Right.

12 **MR. BOUTROUS:** And I think that is what the Court was
13 pointing out. So, so in other words, but you can
14 simultaneously run the apps and be performing services for both
15 companies under -- different companies under other versions of
16 the agreement. And that's really my point. And I think if
17 they were employees, that would not be permissible.

18 So currently, the current agreement, I believe, the one
19 that exists today that drivers are subject to are allowed do
20 that.

21 (Off-the-Record discussion between counsel)

22 **MR. BOUTROUS:** Thank you. So for example --

23 **THE COURT:** Do you have an exhibit number?

24 **MR. BOUTROUS:** Let's see, the 11-10-2014 agreement.

25 I will get you the exhibit number. But it provides (As read):

1 "Except as is otherwise expressly provided herein
2 with respect to Uber acting as the limited payment
3 collection agent solely for purposes of collecting
4 payment from users on behalf of the customer..."

5 (Reporter interruption)

6 **MR. BOUTROUS:** Okay, let me just back up.

7 Your Honor, the other agreements allow the simultaneous
8 running of the apps. And so there's only five that prohibit
9 it. But five out of 17 means we've got individualized issues
10 on the degree of control.

11 **THE COURT:** Let me hear the response from the
12 Plaintiff on these two points about the termination and
13 mutuality question, but also this running of the apps from
14 contract to contract.

15 **MS. LISS-RIORDAN:** Sure. So on mutual termination,
16 as -- as Your Honor said in the summary-judgment ruling at
17 Footnote 8: Mutual termination provisions do not suggest
18 independent contractor status. And the Supreme Court in *Ayala*
19 actually addressed that specifically, as well, in Footnote 2.

20 As you've pointed out, the Supreme Court noted that the
21 workers' corresponding right to leave is similarly relevant

22 (As read):

23 "An employee may quit, and an independent contractor
24 is legally obligated to complete his contract."

25 So a plumber who walks off the job could owe contract

1 damages.

2 When I asked the Rule 30(b)(6) witness what happens if a
3 driver just wants to leave, he said: Nothing. You can work
4 whenever you want; you don't have to work.

5 So --

6 **THE COURT:** Is that in the record, this --

7 **MS. LISS-RIORDAN:** It's in the record, yes. It's in
8 one of our briefs, which my colleague can pull out, the cite.
9 But that is what the -- I believe Mister -- I can pull that out
10 in a moment, maybe, while I turn to the other question.

11 **THE COURT:** All right.

12 **MS. LISS-RIORDAN:** Is the other question regarding
13 this duty-of-loyalty argument?

14 **THE COURT:** Well, first I want to know, factually:
15 Do you agree that these contracts vary in terms of the ability
16 to simultaneously have competitors' apps going?

17 You may say that that is such a small difference it
18 doesn't make any difference, but I want to know, factually, do
19 you think -- do you know?

20 **MS. LISS-RIORDAN:** Right. When we get into the
21 bigger argument about where that falls into the *Borello*
22 analysis, I'll get to that.

23 But my understanding, Uber has made a huge deal throughout
24 this whole case that it doesn't restrict drivers from using
25 other apps. That's been one of its major arguments. So --

1 **MR. BOUTROUS:** It doesn't, now. But again, that's
2 the point. This class action reaches back so many years. And
3 it's absolutely unequivocally clear that in at least five of
4 these agreements there was a restriction on simultaneous use of
5 the app.

6 And our evidence, Your Honor, drivers say that is crucial.
7 One declarant said it would end his business if he couldn't use
8 multiple apps at the same time. So that goes to the control
9 issue. That would be a issue in a class trial in determining
10 the degree of control, and how it affects status.

11 **THE COURT:** So, what's your response to that? That
12 is, the legal argument is that this to guess the extent of
13 right of control. If they've ceded control by saying, you
14 know, you can do it, but in the past there was a different
15 level of control or from contract to contract where they say
16 you can't have simultaneous apps on, does that suggest varying
17 levels of right of control that suggest the *Borello* analysis
18 may differ?

19 **MS. LISS-RIORDAN:** Well, we need to keep in mind what
20 *Ayala* said. And this is at Page 343 (As read):the key to
21 deciding whether a merits resolution is permitted then is
22 whether certification depends upon the disputed issues."

23 If we don't try to rely at trial on the fact that drivers
24 aren't allowed to use competitors' apps, then why does it
25 matter that some are and some aren't?

1 In other words, they're saying it's a different analysis
2 because the ones who aren't allowed to use the competitors'
3 apps have a stronger case, I suppose, than the ones who are
4 allowed to use competitors' apps.

5 But if we don't even go there, how can that defeat class
6 certification if we're saying that that doesn't matter to the
7 analysis because we're not arguing that they were prohibited
8 from using competitors' apps?

9 That's saying: You have to make this argument, and
10 therefore you can't certify a class. But what if I say: Well,
11 I'm not going to make that argument?

12 **MR. BOUTROUS:** That would violate the Plaintiffs'
13 counsel and the Plaintiffs' duty to the other class members who
14 might have a stronger or weaker claim, Your Honor. That's the
15 problem. The Plaintiffs -- named Plaintiffs can't start giving
16 up arguments of individuals that have a better claim or a worse
17 claim, in terms of control.

18 And Uber would have the right to put those defenses on as
19 to each individual, under *Dukes versus Walmart*. Plaintiff
20 can't strip away Uber's right to put on its defenses. That's
21 exactly what the Supreme Court held in -- in *Dukes*
22 (Indicating).

23 (Document displayed)

24 **THE COURT:** Well, they're saying if this went to
25 trial they wouldn't -- you wouldn't have to put on a defense

1 because they're not making an argument. It would concede
2 that -- that there are not restrictions, that people can use
3 apps, so you won't have to worry about that.

4 **MR. BOUTROUS:** So in that case, they would be
5 forfeiting the rights of earlier users who actually had
6 agreements that had that restriction.

7 So they -- again, that goes to the conflict issue that I
8 mentioned. They'd be giving up the rights of their -- the
9 people they're supposed to be representing. That's why you
10 can't have a class where there are these sorts of differences.

11 **MS. LISS-RIORDAN:** Well, Your Honor, again, I just
12 don't think that's relevant. When you look at the whole
13 analysis, once again, once I get to go through the *Borello*
14 factors, we're just not -- we're not relying oh on that.

15 One of the potential subclasses that we've suggested and I
16 have outlined in a trial plan that I'll hand up when you're
17 ready for it is if the Court thought we needed to divide it up
18 that way, we could -- we could divide it up.

19 Mr. Manahan used Lyft as well as Uber. The other
20 Plaintiffs did not. There are ways that that could be managed,
21 if that were material. But I just don't see it as material.

22 But, I found the cite for the prior proposition we were
23 talking about.

24 **THE COURT:** Yeah.

25 **MS. LISS-RIORDAN:** It's in Mr. Colman's deposition.

1 He was the 30(b)(6) witness. This is Exhibit 2 to the
2 Plaintiffs' motion, Pages 244 to 245.

3 I asked, if a driver doesn't -- if a driver decides that
4 he or she doesn't want to use Uber anymore -- now I'm back on
5 Page 243; I'm sorry (As read):

6 "If the driver decides he or she doesn't want to use
7 Uber anymore, they don't have to give some kind of
8 notice to Uber, do they?"

9 Then there's a lot of objection and colloquy. And then on
10 Page 245, the 30(b)(6) witness says:

11 "They don't have to give us notice when they want to
12 go online; they don't have to give us notice when
13 they want to go offline. They can simply choose to
14 do that on their own."

15 There's nothing in the testimony that they would -- it's
16 just that they're free to go on and off. They're free to quit.

17 **THE COURT:** Well, there's a difference between
18 quitting, I guess, and going offline. I mean, going offline is
19 something you do at the end of the day or you finish that ride.
20 I don't know if he meant it in that fashion, or if he meant
21 "offline" meaning "I'm not going to deal with Uber again."

22 **MS. LISS-RIORDAN:** All right. I'm sorry. I don't
23 have it at my fingertips. But I believe it's somewhere else in
24 the record, either in class certification or in summary
25 judgment, that -- I've seen no evidence whatsoever that Uber

1 drivers are expected to or in any way pay any contract damages
2 to Uber when they quit.

3 **THE COURT:** All right. But what you just cited
4 didn't seem to --

5 **MS. LISS-RIORDAN:** Okay. Well, that was going
6 offline for that shift, perhaps. But there's no evidence that
7 like in a plumber or classic independent-contract relationship,
8 Uber collects or seeks damages when a driver quits.

9 **THE COURT:** All right. But a bigger picture of this
10 is there are all sorts of other rights of control that I think
11 are uniform with respect to whether Uber has the right or
12 doesn't have the right, such as controlling driver's schedules.
13 Very limited control over that. All you have to do is report,
14 what, once a month, or whatever, that minimum?

15 **MR. BOUTROUS:** (Nods head)

16 **THE COURT:** Controlling drivers' routes. Don't have
17 control over that.

18 Controlling the fare. Well, that is set. I understand
19 the argument that he can turn off the meter early, but
20 generally that is set. And that is a power, that is a right of
21 control. It's not something that some other player has that
22 right to control.

23 The use of third parties, that's the one we just talked
24 about, where it sounds like there's perhaps some variance
25 there.

1 Monitoring drivers' performance through the star rating
2 feedback system. It's variously stated in there, but the
3 general fact of that star rating system, the ability to
4 implement that, the ability to -- to monitor that, and then the
5 ability to do something about it, at least in a general sense,
6 is within Uber's power.

7 Now, some of the contracts are more specific about what
8 the consequences might be. But that doesn't mean that Uber
9 can't -- it seems to me, can't at some point say: We're going
10 to implement a more specific system that's more, you know,
11 quantitatively calibrated, or something like that.

12 **MS. LISS-RIORDAN:** On that point, can I just note a
13 very specific -- because I think that is a very important
14 point.

15 Regardless of what all of the contracts say, it is
16 admitted, it was admitted by both the Rule 30(b)(6) witness as
17 well as Ryan Graves, that this star rating system is used
18 throughout the Uber system. It's in most of the contracts, not
19 all of the contracts.

20 But the Rule 30(b)(6) witness, Mr. Colman, testified that
21 all drivers are subject to the star rating system, and that
22 Uber managers in each city have the discretion to set the
23 minimum rating and deactivate drivers who don't meet whatever
24 minimum they've set.

25 And the testimony of the general managers who I deposed

1 from San Francisco and Los Angeles confirmed that they have the
2 discretion to decide who gets deactivated, who gets a second
3 chance. So, that's from the 30(b)(6) witness.

4 And just another point that I want to make while we're
5 parsing all of these differences here and there through the
6 contracts, Ryan Graves, the -- I believe he's the global
7 operations manager for Uber, he's the vice-president. He
8 admitted in his deposition, you know, Uber's making such a big
9 deal about all these various contracts now. There's no
10 practice in place for Uber management to go check which version
11 of a contract drivers are driving under before deciding whether
12 they can be deactivated. That's Exhibit 3 to our reply brief,
13 at 186.

14 And indeed, in the summary-judgment record, we have
15 evidence -- plenty of evidence we submitted that reflects that
16 Uber does, in fact, have a policy and practice of terminating
17 drivers in its discretion. And there's no evidence that anyone
18 goes back and checks which contract, to see whether they're
19 allowed do that or not.

20 We have not located any evidence of any contracts saying
21 that there's a for-cause provision. I believe Mr. Boutrous
22 stated that a little while ago, but we don't see that, even in
23 Agreements A and B.

24 **THE COURT:** Wait. What is it that you don't -- now
25 I'm confused. Are you talking termination?

1 **MR. BOUTROUS:** Right. I'm sorry, I'm going back.
2 Right. The right to terminate. I believe he had said earlier,
3 some of the contracts say they can only terminate for cause.
4 We haven't seen that in any of the contracts.

5 **THE COURT:** Well, the contracts have a for-cause
6 provision, and they also have a non-for-cause provision. Some
7 of them say, without regard to cause, you can terminate on
8 seven- or 30-day notice.

9 Some other provisions within the same contract will say:
10 And if you screw up, if you violate our rules, if you lose your
11 license, we can terminate immediately.

12 So it's a different -- it's a different -- you know, a
13 hierarchy.

14 **MS. LISS-RIORDAN:** All of the contracts -- we've gone
15 through them. They all give either Uber the right to terminate
16 at will, in its discretion, or they have a mutual right of
17 termination, which we talked about. And I cited the footnote
18 from *Ayala* that says that that's consistent with an employment
19 status.

20 What I'm saying is I haven't seen any contract that only
21 gives Uber the right to terminate for cause.

22 **THE COURT:** I didn't say that. I said in addition,
23 there's a right to terminate for cause, quicker.

24 **MS. LISS-RIORDAN:** Well, of course, if you can
25 terminate for any reason, of course you can terminate for

1 cause. So from a labor perspective, the question is whether
2 the employer can terminate for whatever reason, in its
3 discretion.

4 And I think that's what *Ayala* says is overriding. Because
5 then that gives the -- the employer the ability to -- the
6 workers are all going to do what they think the employer wants
7 them to do, because they know they can be terminated for any
8 reason, or no reason at all.

9 And *Ayala* also says that it's not relevant; that a hirer
10 chooses not to wield power does not prove it lacks the power.
11 That's at Page 173.

12 **MR. BOUTROUS:** Your Honor, before --

13 **MS. LISS-RIORDAN:** But I don't -- I still haven't
14 done my full -- so I'll stop interrupting, unless you're ready
15 to hear my fuller argument.

16 **MR. BOUTROUS:** The star system issue. Again, I think
17 we do need to be precise here.

18 As the Court noted, some of the agreements, by my count --
19 and we can get you the annotated to the actual exhibits, but
20 ten expressly permit Uber to deactivate a driver based on the
21 star ratings, but seven do not.

22 And we started this discussion with --

23 **THE COURT:** Well, expressly. I think if you read
24 other parts of the agreement, there's some general language
25 about not meeting our standards or other things that you can

1 imply into that.

2 **MR. BOUTROUS:** That would be for the trial,
3 Your Honor. And, exactly. That's my point. That once we get
4 into -- and this was -- the Court made this point, being we
5 start with the contract.

6 So if we look at the contracts, and ten say you can do it
7 and seven don't say anything, then, then we would at trial --
8 imagine it was just a trial of one person, one contract. We
9 would have a trial over this, that: Was there control? Was
10 this happening?

11 So for the seven where they do not have that, then we
12 would look at course of conduct and other issues. For the ten,
13 we have it expressly in there.

14 Now, Mr. Graves actually testified that he wasn't aware of
15 a process of that sort for checking the contract --

16 **THE COURT:** Well, let's be realistic. Is Uber going
17 to present some evidence that despite a failing grade on the
18 stars, they felt that they did not have -- Uber did not have
19 the power to terminate somebody? That seems highly unlikely.

20 **MR. BOUTROUS:** Well, again, we kind of go back. We
21 started focusing just on the contract language. I think once
22 we get into the way that drivers interacted with -- interact
23 with Uber, it varies a great degree.

24 **THE COURT:** Well, it may on certain issues, but on
25 this particular issue you're trying to make a stand on this

1 question about whether Uber retains the power, the right of
2 control to terminate somebody who falls below standards, gets
3 crummy reviews, feedback on the star rating system. And you
4 say: Well, only ten expressly grant that power. We don't know
5 about the rest, and therefore it's an issue, a variation issue
6 that defies predominance and commonality.

7 But my response is: Well, that doesn't seem very
8 realistic. I mean, is Uber truly going to say it did not have
9 the authority and the right to control with respect to somebody
10 who's below standards and doesn't cut it, that they can't do
11 anything about it, with or without the ten ex- -- and I -- I
12 don't think any evidence like that's going to come out. So I
13 imagine that's not going to be an issue in dispute.

14 **MR. BOUTROUS:** As you stated, it's probably unlikely,
15 that -- because as you noted, some of these, both sides can
16 walk away. But that doesn't indicate employment status.
17 That's what I keep coming back to. And again, if --

18 **THE COURT:** But if you retain the power, the fact
19 that it didn't -- wasn't expressly authorized explicitly in the
20 contract, but perhaps implicitly or by nature of the
21 relationship, if it had that power and the evidence shows that
22 it exercised that power, and there was contrary evidence, then
23 there is uniformity. There's common proof that that was the
24 right of control.

25 **MS. LISS-RIORDAN:** And if Uber's 30(b)(6) witness

1 admits that the Uber managers in each city have the discretion
2 to set the minimum rating and the discretion to deactivate
3 drivers who don't meet it, then that establishes it. They
4 can't argue otherwise, because they have an admission from
5 their Rule 30(b)(6) deponent.

6 And he didn't say -- and I also asked him: Is there a
7 process in place for automatically deactivating drivers once
8 they fall below a threshold?

9 And he said: No. It's in the manager's discretion.

10 **MR. BOUTROUS:** And Your Honor, again, to go back to
11 the *Walmart* decision, how can it be that if people have
12 discretion -- that was the whole issue in the *Dukes* case, where
13 the individual managers had discretion about what they do. How
14 can we say we have commonality and predominance of common
15 issues?

16 **THE COURT:** Oh, because this is a different issue.
17 This is not about whether or not there was discrimination or
18 discriminatory pattern that was subject to company-wide proof.
19 The issue here is whether there was the reservoir of power, the
20 right to control.

21 And if the right to control is manifest by granting
22 discretion here and there, that means the company did have the
23 right of control.

24 **MR. BOUTROUS:** But here is the missing piece, though,
25 Your Honor: The right to terminate is generally viewed as --

1 when it is viewed as an indicia of control, where it's used to
2 actually make people act differently. And you have evidence
3 that that's happening.

4 Plaintiffs had -- I want to return to -- Plaintiffs had
5 the burden of proof of bringing forth evidence to prove these
6 issues, that this could be proven on a common, common-wide
7 basis. There's no evidence that Uber was exercising this right
8 to terminate, saying to someone, you know --

9 **THE COURT:** I don't think the cases say you have to
10 show that it actually was exercised to influence or coerce
11 people. Just the existence of the power to terminate
12 unilaterally indicates a reservoir of power, of ability to
13 control.

14 **MR. BOUTROUS:** I think it's one of these issues where
15 we need to see the course of conduct of the various parties.
16 And I think it would vary significantly if you looked across
17 this whole range of 160,000 drivers.

18 And again, the 30(b)(6) deposition testimony that
19 counsel's referring to was -- again, I don't have the quote in
20 front of me, but it sounds like that's talking about the
21 current state of affairs when that deposition was taken. But
22 this class, we have to remember, goes back to the beginning of
23 Uber's operations in California in 2009.

24 That's a lot to bite off in one case, in terms of
25 practices and how the company operated, how -- the course of

1 conduct of the parties, what degree of control was being
2 exercised. All of these things. And it's just -- it's not
3 doable in a big class action.

4 And one of the -- well, I didn't mean to interrupt you
5 (Indicating). I keep --

6 **THE COURT:** Let me go -- there's some other issues
7 that I think actually are -- that I find more significant. And
8 one of those is -- I hate to skip around, but time is limited.

9 One of the main secondary factors of *Borello* that you have
10 emphasized here is whether or not the -- the putative employee
11 runs a distinct business. Has its own enterprise. And one of
12 the declarations that you juxtaposed against the named
13 Plaintiff here is an illustration of that. And there are many
14 of those. And, that does to me seem significant. And that is,
15 that is one of the secondary factors.

16 If you operate your own business -- and some, it's not
17 just incorporating and having a d/b/a, but actually running a
18 limousine company, and deriving only 10 percent of your
19 revenues from Uber, and hiring, you know, 34 different drivers,
20 many of which you get on your own or you get through other
21 sources. That sure does look like an independent contractor to
22 me. And it fits one of the *Borello* secondary factors.

23 **MS. LISS-RIORDAN:** Except that last year, 2014, the
24 Ninth Circuit in *Alexander versus Fed Ex* said that they were
25 employees, too. These so-called multi-route drivers who were

1 running their own businesses, who had plenty of drivers under
2 them.

3 So it's not material to the analysis because --

4 **THE COURT:** Well, I wouldn't say it's not material.
5 It didn't tip the balance there because in that case there were
6 so many other indicia of quite a bit of control, because they
7 made sure that everybody had to work like, ten hours a day.
8 They loaded them with so many things. They knew they had to go
9 to warehouse by 7:30, 8:00 in the morning; they weren't going
10 to get done until 8:00 at night.

11 It wasn't come and go as you please; turn on your app when
12 you want to. They had to show up. They had to work. And they
13 had to go to a specific place. And although they weren't told
14 the routes, they were told which packages to deliver,
15 et cetera.

16 So one could argue that the *Borello* analysis, the calculus
17 there was so strong on that one end that the fact that they had
18 independent -- they had their own hirees, they could contract
19 out and get drivers to do their subcontracting, have their own
20 companies, was not enough. That secondary factor was not
21 enough to overcome the big *Borello* factor.

22 And one could argue that -- I don't know if it's true or
23 not, and we'll see -- that here, the calculus is a little
24 different. You don't have the same amount of control. People
25 can sign on whenever they want, sign off whenever they want,

1 report as little as once every month, have a lot of freedom.
2 Seemingly more freedom than the *Alexander* case. And therefore,
3 the other *Borello* factors might come into play, because now you
4 have a different calculus.

5 **MS. LISS-RIORDAN:** But Your Honor, under *Ayala*, the
6 most important factor is the right to terminate at will. And
7 the drivers who have their own little companies are under that
8 same control as the drivers who are under them, and the drivers
9 who just contract directly.

10 So, the fact -- and for class-certification purposes,
11 again, the fact that drivers have the opportunity if they wish
12 to set up their own little companies and have drivers under
13 them is common. Everyone has that opportunity. So, the focus
14 now --

15 **THE COURT:** I agree, that *Borello* factor that uses
16 the word "opportunity" is very different. Because as long as
17 you have the opportunity, whether you exercise it or not, that
18 resolves that factor. I think that can be determined on a
19 common-proof basis, because we're only talking about
20 opportunity.

21 But here, to the extent that there are differing entities
22 that contract, I'm wondering whether the class, if there's
23 going to be a class, needs to be defined in a way that does not
24 include these companies.

25 **MS. LISS-RIORDAN:** Okay. Well, so, if we look at the

1 chart, which -- I don't know if you're segueing into letting me
2 do this presentation. I have a demonstrative of it I could
3 hand up, if the Court would allow me?

4 **THE COURT:** Probably, because my eyes aren't good
5 enough to read --

6 (Document handed up to the Court)

7 **THE COURT:** I don't know if you have yet another
8 extra for Mister (Inaudible) here, but that would be great.

9 **MS. LISS-RIORDAN:** We've gone through the *Borello*
10 factors.

11 **MR. BOUTROUS:** Can I --

12 **MS. LISS-RIORDAN:** And put an X next to the ones that
13 are common, and we've left a blank where they're not common.
14 And if you look at the -- the primary *Borello* factors and the
15 secondary *Borello* factors, seven out of nine of them, we have
16 an X in the common box.

17 And then even if you go to the other factors which you
18 mentioned in the summary-judgment motion, although *Ayala* on a
19 footnote passed out on whether they're even part of the
20 analysis anymore, that was Footnote 3 in *Ayala* --

21 (Document displayed)

22 **MS. LISS-RIORDAN:** -- all five of these factors are
23 common (Indicating). So --

24 **THE COURT:** But I would like you to focus on the one
25 that you didn't X, which is the one I'm focusing on, which is

1 the second factor. Which, you know, also as the courts say,
2 the importance of each factor may vary from case to case.
3 There's no predetermined hierarchy, other than right to control
4 still remains at the top.

5 **MS. LISS-RIORDAN:** Right. I just --

6 **THE COURT:** So, what about this?

7 **MS. LISS-RIORDAN:** Well, I just want to point out
8 from your summary-judgment decision, when you evaluated this
9 case on summary judgment, you went through a number of the
10 factors. You didn't go through all of the factors, because you
11 didn't think it was necessary. But you went through a number
12 of the factors, and found some to appear to support employee
13 status.

14 And then you said, at Page 15 (As read):

15 "To be sure, a number of secondary factors, e.g.
16 drivers use their our vehicle, may employ other
17 drivers to drive on their behalf, and sign an
18 agreement stating no employment relationship is
19 created, do support an independent contractor
20 classification."

21 But then you said:

22 "But even as to those factors, the significance is
23 ambiguous."

24 And what I would submit now is that even as to those
25 factors, they're the same for everyone.

1 On No. 2, the drivers could all have their own business
2 employing other drivers if they wanted to. Some do, some
3 don't.

4 If you wanted to divide up the class in such a way or
5 create a subclass of such drivers, that could be one way to
6 manage it. If you really think that that one factor of the
7 nine or potentially 14 *Borello* factors is that significant in
8 this case, that could be done, too.

9 And again, I just want to highlight, in *Fed Ex*, an
10 enormous amount of the litigation that went on in that case
11 involving the class certification was the question about
12 whether these so-called multi-route drivers could be in the
13 class with the single-route drivers. And in the end it was
14 decided by the Ninth Circuit that these drivers who had their
15 own little businesses were just -- were subject to the same
16 controls as *Fed Ex*.

17 Now, in this case, we agree. The controls that you have
18 here are not the same as what they were in *Fed Ex*. But in some
19 ways, as you pointed out in your summary-judgment order,
20 they're even stronger because of that constant monitoring by
21 the passenger star rating system. And you had an apt quote
22 from Foucalt the constant monitoring.

23 Those drivers who have their own drivers under them do
24 that --

25 **THE COURT:** Is there a dispute that to have your own

1 driver, do they still have to sign a driver addendum? They
2 still have to go through -- does Uber have the right to screen
3 and approve every driver --

4 **MS. LISS-RIORDAN:** Yes.

5 **THE COURT:** Even if it's through a transportation
6 company?

7 **MS. LISS-RIORDAN:** Yes, yes. Every driver has to
8 sign -- every driver has to sign a contract directly with Uber.
9 So Mr. Colopy, who drove through a transportation company,
10 signed directly with Uber. The driver who --

11 **THE COURT:** Does every such subcontracting driver
12 have to show they've got the right license and the --

13 **MS. LISS-RIORDAN:** Yes. They all have to show it to
14 Uber. Yes.

15 **THE COURT:** And Uber can say no?

16 **MS. LISS-RIORDAN:** Yes. They run their background
17 check.

18 **THE COURT:** Is there a dispute about that?

19 **MR. BOUTROUS:** That's correct. They have to meet the
20 same criteria to use the app.

21 **THE COURT:** And once they sign the driver addendum,
22 then they're bound by whatever the rules are that apply to
23 everybody else.

24 **MR. BOUTROUS:** That's correct, Your Honor.

25 **MS. LISS-RIORDAN:** Yes.

1 **MR. BOUTROUS:** And that's what the driver addenda are
2 on that chart. But --

3 **MS. LISS-RIORDAN:** And again, we're only seeking to
4 include the drivers who actually drove for Uber. So to the
5 extent there are people out there -- I don't even know if there
6 are -- who run little transportation companies who don't drive,
7 themselves, but they just oversee other drivers, they wouldn't
8 be part of the class definition, because we're only asking for
9 people who drove for Uber.

10 **MR. BOUTROUS:** Your Honor, I'm just going to lodge an
11 objection. This notion that these little businesses -- sort of
12 this condescending notion that people who have their own
13 transportation -- we have 39 people who have people who work
14 for them. They have businesses. We have 30 people who have
15 their own proprietorships for businesses.

16 The guesswork as to who they are, the class counsel and
17 the Plaintiffs, they were supposed to show the Court that those
18 people were -- stood in common position to the named
19 Plaintiffs. They don't -- none of the named Plaintiffs have
20 employees. In fact, one of them works for other limo
21 companies. That's the point here.

22 And, counsel has one of the boxes checked -- may I use
23 your chart for a second? One where they put no check, this one
24 (Indicating), No. 2 here, they call "common."

25 "the alleged employee's investment in equipment or

1 materials required for his task, or his employment of
2 helpers."

3 We have 69 people, or at least 39 from our declarations,
4 alone, who employ helpers. They have people who work for them.
5 That is not common (Indicating).

6 And so those are the kind of individualized issues that
7 would have to be adjudicated in the case.

8 **THE COURT:** Well, the question is how material it is,
9 because it -- it underscores the predominance question we have
10 to face. There are -- there are already now some admitted
11 variance in at least some of the factors, which is going to
12 expect -- I don't know if you're ever going to have a case
13 where all 14, 17, 19 *Borello* factors all line up one way or the
14 other.

15 The question is, you know: Does it create a predominance
16 problem here. And you know, if it does, is there a way to
17 handle it in terms of manageability, superiority and everything
18 else.

19 And your suggestion is for this one factor for instance.
20 and maybe on the helper question, I'm not sure, you could
21 create a subclass. And the jury could determine, well, for
22 this subclass the calculus comes out one way, and for the other
23 subclass it turns out the other way.

24 **MR. BOUTROUS:** Well, Your Honor, on this subclass
25 issue, I must say -- and by the way, this *Borello* analysis,

1 that's not in the class-certification motion. So, this is an
2 unusual proceeding.

3 The Plaintiffs had an obligation under *Dukes* to come
4 forward with evidence that proved these things could be proven
5 on a class-wide basis, and that individual issues -- common
6 issues predominated. They didn't meet their burden. They
7 formed this legal question of control.

8 And the test is not whether people could hire other
9 people. It's whether they do have people working for them.
10 And as this Court has pointed out, you have to consider all
11 these factors together with respect -- and now I'm not putting
12 words in your mouth, but you have to consider it with respect
13 to each of these individuals, on predominance.

14 And again the *Sotelo* case -- you know, counsel cited
15 *Ayala*. The *Sotelo* case was cited with approval. And it had
16 the exact same --

17 (Document displayed)

18 **MR. BOUTROUS:** Your Honor, this is, I think, telling.
19 *Sotelo*. I've got it up on the screen. It was newspaper
20 carriers, just like *Ayala*. *Ayala* cites it approvingly as an
21 example of where the variance in the individual factors, the
22 secondary factors, could defeat class certification.

23 If one reads the *Sotelo* case, it was the Court of Appeal
24 on this. The court there found that there were too many
25 variances on those secondary factors. That individual issues

1 predominated.

2 And that's the case here. It's not enough to just say:
3 Well, people could all act the same way. They could all have
4 the same features. These are real live human beings, who vary
5 widely under these factors.

6 And we haven't even got to damages, where there was no
7 submission of an expert or a class-wide damages model.

8 So I think on these predominance issues, Your Honor, it's
9 a hornets' nest. There's no way we could say that individual
10 issues are so minuscule that common issues predominate. But
11 that just shows, it's a very precise nuanced look --

12 **THE COURT:** Well, it's certainly not the case that
13 every time you find some variance on one of the 14 *Borello*
14 factors, that's the end of the inquiry.

15 **MR. BOUTROUS:** I totally agree, Your Honor.

16 **THE COURT:** You do have to look at the importance of
17 it, and its likely role. So, take the helper thing for
18 example. Yeah, that's a factor, but that's also mitigated
19 because some cases say that if the putative employer exercises
20 direct control over those helpers, which is the argument here,
21 because these helpers have to sign the same driver addendum,
22 have to go through the screening process, et cetera, et cetera,
23 that makes it look a lot less like your traditional independent
24 contractor situation than what we have here.

25 I mean normally, you don't have the right to tell your

1 plumber which journeymen and apprentice to have working on your
2 sink. But in this the case, Uber does.

3 **MR. BOUTROUS:** Well, Your Honor --

4 **THE COURT:** So it's a little different. So that
5 factor, although it is one of the factors, it gets a half point
6 instead of a full point.

7 **MR. BOUTROUS:** Well, I think it should get more than
8 a full point, because I don't think you'll find another case
9 where someone was being alleged to be an employee where he or
10 she had 39 people working for them, had their own company, said
11 that the supposed employer -- and this was one of the slides I
12 just showed --

13 (Document displayed)

14 **MR. BOUTROUS:** -- had no power over what they do. So
15 as this Court noted, some of these factors don't work. They're
16 outmoded. But Mr. Forester, there's no case where someone like
17 that was deemed an employee.

18 **THE COURT:** Not even in *Alexander*?

19 **MR. BOUTROUS:** No. And when you combine it with, as
20 this Court found, the lack of control. And I keep hearing
21 *Alexander* cited, and I was here for that prior hearing. And
22 Your Honor, there couldn't be a more dramatic contrast in terms
23 of control and the like.

24 So, it is a mix of factors. Some of the factors don't
25 quite fit. And I think this right-to-terminate point goes to

1 that. It's much different than a situation where someone's
2 hired, they come in, they work 9:00 to 5:00 and the employer
3 has the right to terminate them at will. These are licensing
4 agreements on an app. So it's very different.

5 But this --

6 **MS. LISS-RIORDAN:** Your --

7 **MR. BOUTROUS:** Okay.

8 **MS. LISS-RIORDAN:** Your Honor, the putative class
9 member that Mr. Boutrous is talking about that has 39 drivers
10 under him, again, we're only seeking to include people who
11 drive for Uber. And that person, just like every other Uber
12 driver, is subject to the right to be terminated in Uber's
13 discretion if his star rating goes too low, or if Uber
14 management decides that they don't want him there anymore. And
15 under *Ayala*, that is the most important way to show control.

16 So all these other arguments they are going to make about
17 how control here is different, not as strong than in the
18 *Alexander* case against --

19 **THE COURT:** Well, it is a factor, because one
20 performing -- one of the *Ayala* factors is one performing
21 services. And that's by definition, you say you're limited in
22 your class to drivers, they have to be drivers to perform
23 services. But, who was engaged in a distinct act or distinct
24 business. So you can be performing the service, but have your
25 own distinct business. And the courts suggest that is one

1 factor. Whether it's --

2 **MS. LISS-RIORDAN:** Right. So we don't have an X in
3 that one box. Two boxes out of 14 don't have an X.

4 But again, the opportunity to do so -- and some of the
5 cases talk about opportunity for profit and loss. With respect
6 to the argument --

7 **THE COURT:** They understand, the opportunity is
8 there. Whether they take it or not is not the point. It's
9 almost like the right to control, rather than exercise of
10 control.

11 **MS. LISS-RIORDAN:** Correct.

12 **THE COURT:** So how it's phrased is a little
13 different.

14 **MS. LISS-RIORDAN:** Correct.

15 **THE COURT:** I'm aware of that. I'm aware of the
16 other factors, how they sort of cut.

17 But let me ask, well, one practical question. Are the
18 people who have a business, who operate, who have a distinct
19 business, is that -- how ascertainable is that? Is that
20 evident? Is that in the contracts?

21 Would they know that Mr. Forester is contracting through
22 or partly as the Seven-by-Seven Executive Transport?

23 **MS. LISS-RIORDAN:** Yes. Because the drivers like
24 Mr. Colopy who drive through these transportation companies,
25 the pay gets funneled through the transportation companies. So

1 Uber pays the company who then distributes money to the
2 drivers.

3 So, yes. Uber would know who has their own transportation
4 company with other drivers under it, as well as which drivers
5 work through the transportation companies.

6 **THE COURT:** That would apply to Mr. Forester? He's
7 the owner of his company. Does -- would that be evident?

8 **MR. BOUTROUS:** Your Honor, I don't think that's
9 correct. There's no evidence that that's correct. There's no
10 evidence that you could ascertain individuals who have people
11 working for them.

12 And this goes back to my point: Plaintiffs defaulted on
13 their obligations under *Dukes* and under *Comcast* to provide
14 evidence. This isn't supposed to be a pleading or -- based on
15 what counsel says now, for the first time. This is not in any
16 brief.

17 **MS. LISS-RIORDAN:** That's not correct.

18 **MR. BOUTROUS:** This is not something that has been
19 discussed. And I don't think it's correct that you could
20 ascertain everyone who has someone working under them. I don't
21 think it's correct. It certainly hasn't been briefed. And it
22 was the Plaintiffs' burden to demonstrate that.

23 **MS. LISS-RIORDAN:** Your Honor, it's not correct.
24 There's in evidence the record, there's in evidence the
25 summary-judgment record, that Mr. Colopy received his pay

1 through the transportation company. And we talked about this.
2 We noted it through our class-certification papers.

3 **THE COURT:** Well, there's different kinds. There's
4 somebody who works for another third party who contracts with
5 Uber, and then there are the people who work for Uber sort of
6 directly, but have their own company as well.

7 **MS. LISS-RIORDAN:** Right.

8 **THE COURT:** I'm talking about the latter.

9 Mr. Forester's not the --

10 **MS. LISS-RIORDAN:** Right. Well, I believe in the
11 30(b)(6) deposition -- and I could pull out pages to see if
12 they made it into exhibits here -- Uber's 30(b)(6) witness
13 agreed that people either contract directly and get paid
14 directly, or they go through these companies and they get the
15 pay through the companies. I don't think there's really any
16 dispute about this.

17 **THE COURT:** Is there any -- I know you say they
18 failed to present evidence, Mr. Boutrous, but do you have any
19 contrary evidence that somebody like Mr. Forester wouldn't be
20 identifiable from Uber's perspective as somebody who has a
21 company?

22 **MR. BOUTROUS:** Your Honor, I don't know. Many of
23 them are incorporated. And we don't know, you know, sort of
24 the -- the situation that individuals are in. And so I can't
25 say, standing here, that we would be able to determine everyone

1 like Mr. Forester who --

2 **THE COURT:** If it's incorporated, would they normally
3 sign the contract as "Ed Chen, Incorporated"?

4 **MR. BOUTROUS:** I think so.

5 **THE COURT:** I hope so. That's the purpose of
6 incorporating.

7 **MR. BOUTROUS:** And again, Your Honor, I want to come
8 back to this because I want to get you all the information you
9 need. But, this should have been a major part of the class
10 certification briefing. As should have subclasses. As should
11 have a damages model. As should have this *Borello* analysis
12 (Indicating). It's not in the class certification brief.

13 And, the Plaintiffs have the burden to show. It can't be
14 that we're uncertain about this. That we're going to put all
15 of these individuals into one big class, when there's no record
16 here. And it was the Plaintiffs' burden to put that on.

17 And we can get the Court more information on these issues.
18 And I don't want to start speculating on some of these things,
19 but that was what the class certification motion was supposed
20 to be. It's not a light undertaking to say: We're going to
21 represent all these people. And it could come back to haunt
22 all those people. It could affect their lives in a big way.

23 And the other *Borello* factor that counsel does concede is
24 relevant and I think it's not to be underestimated, is: Do
25 people believe they are independent contractors? Do they want

1 to be independent contractors? What was their intent? And
2 that, as we know, even if there's a thousand --

3 **THE COURT:** Let me ask you this. You know, again,
4 it's: How do you phrase the question? And I admit that the
5 case law is not crystal-clear on this, but it seems like --
6 courts have said labels really don't count for much. The
7 labels the parties put on it, minimal weight to give to labels.

8 So it seems to me whatever their beliefs were as to a
9 label is not as important as their belief as to the substance
10 of the relationship. Do they feel like they were going to be
11 under the control and have all the attributes and look like an
12 employment relationship? Or do they think it's going to be
13 more an independent contract relationship?

14 And I will say that -- and the question now for me is: Is
15 there enough common proof -- is there likely to be common proof
16 to inform that? And right now, it sure does look like there's
17 a lot of common proof, and it looks like it cuts in favor of
18 Uber, because everybody knows, you know, you sign on when you
19 want. You sign off when you want. There's nobody to tell you
20 that you've got to get up at 8:00 and be here at a certain
21 time. You get paid by the ride. You don't get paid by the
22 hour. You don't sign a W2. You get a 1099. Right? You don't
23 pay taxes. You don't pay Social Security. You don't get
24 workers' comp. You don't get -- you know. So, it has all the
25 attributes.

1 So all those are objective factors that can be proven by
2 common proof, it seems. I don't know how much variation
3 there's going to be. I understand you've got three people who
4 are class reps who say: Well, I thought I was getting into an
5 employment relationship.

6 But in terms of what the proof is going to look like, a
7 lot of that proof is going to look pretty class-wide.

8 **MS. LISS-RIORDAN:** And that's exactly the issue that
9 was raised in the *Alexander versus Fed Ex* case, when Fed Ex
10 submitted a slew of declarations from drivers saying: I run my
11 own company, I like not having a boss, I like being able to
12 write my expenses off on my tax returns. These people can't
13 represent all of those drivers who like being their own boss
14 and really feel their in an independent contract relationship.

15 And again, the Ninth Circuit held as a matter of law they
16 are employees, notwithstanding the issues.

17 **THE COURT:** I'm just saying: Is there variation in
18 proof on this one *Borello* issue that creates a commonality
19 predominance problem, because there is going to be some
20 subjective -- we already see some subjective differences
21 between your people and your people, at least presented to the
22 Court.

23 But my reaction is: Well, okay, that's one factor. Not
24 only is it one of 14 or 17 factors, but within that factor, the
25 proof that's going to be used, there's going to be a lot of

1 circumstantial evidence about what people's expectations and
2 beliefs were. And a lot of that will run through the class.

3 I mean, notwithstanding the protestations to the contrary
4 of your clients, there's going to be common proof about what
5 they were told, what the nature of the relationship -- how much
6 freedom they would have, et cetera, et cetera.

7 **MS. LISS-RIORDAN:** Right. And my point is that on
8 these two factors that we don't have the box checked for,
9 because of *Alexander*, it doesn't matter. Because we can win,
10 even without pressing that.

11 **MR. BOUTROUS:** That's just wrong, Your Honor.

12 **MS. LISS-RIORDAN:** And --

13 **THE COURT:** All right. I've already stated my views.
14 I understand *Alexander*, and I've already stated that that may
15 or may not be the case. There is a different -- *Alexander* is
16 not simply dispositive, it's not simply on all fours because
17 you have a different, a stronger up-front *Borello* factor there
18 that's missing here.

19 You may end up in the same place; I don't know. But I'm
20 saying it's a potentially different calculus.

21 **MR. BOUTROUS:** Your Honor --

22 **MS. LISS-RIORDAN:** The point is that it was certified
23 years ago, even before the Ninth Circuit made its ruling last
24 year. It was certified years ago, even though Fed Ex put in
25 all these declarations of the drivers that liked being their

1 own boss and they --

2 **THE COURT:** I understand that. But the Ninth Circuit
3 never ruled on class certification. Now, had they come back --
4 I don't think they said anything about that. It was just
5 certified; wasn't appealed.

6 **MS. LISS-RIORDAN:** Well, no, they did. I mean, they
7 did say at the end of the decision that they denied -- Fed Ex
8 filed a conditional cross-motion to decertify if the decision
9 was based on any individualized factors.

10 And the Ninth Circuit said: No, our decision is not based
11 on individualized factors. So, denied.

12 **THE COURT:** Which is easy to do after you've
13 identified the factors, and weighed -- but it's a little hard
14 to do in advance.

15 **MS. LISS-RIORDAN:** That goes to a very important
16 point. May I -- may I get to a very important point that I
17 want to talk about? It flows into the trial plan which I
18 assume you want to start looking at.

19 **THE COURT:** Well, I get a feeling that Mr. Boutrous
20 wants to --

21 **MR. BOUTROUS:** I want to go back -- and I promise I
22 don't want to interrupt your presentation.

23 But, I have never heard of a class certified where the
24 core issue in the case and one of the major factors, the three
25 named Plaintiffs are diametrically opposed to all the other

1 evidence in the record.

2 And so on this issue of: Do they believe -- do they
3 intend to be an employer or an independent contractor, *Borello*
4 said that's significant if they agreed to it, and they are
5 indicating a desire.

6 So, while the Court's right, I think we will have the
7 better of it. I think the majority of individuals would say:
8 I think I'm an independent contractor; I want to be an
9 independent contractor; this is what I want.

10 There are going to be differences, and it can't be that
11 the differences with the named Plaintiffs aren't crucial to
12 determining whether they can represent all those other people.
13 It just can't be.

14 **THE COURT:** Well, unless you think this last factor
15 in *Borello* is sort of the least weighty in the constellation of
16 everything else.

17 **MR. BOUTROUS:** I know you don't think that,
18 Your Honor. What the people intend? This would be like
19 involuntary, you know, sweeping in and having the named
20 Plaintiffs pursuing an objective.

21 Think of it as a lawyer, if I was able to just go
22 represent someone who didn't want me to achieve an objective
23 for them. That's not right.

24 **THE COURT:** That's why we have a class mechanism, to
25 make sure that the fiduciary duty is carried out, which

1 sometimes has to be exercised independent of what some
2 individual class member might have to say.

3 It's got to be taken into consideration, but there's a
4 larger -- like you stated, larger issues and interests here
5 that kind of transcend any particular, you know, unnamed
6 Plaintiffs' view sometimes.

7 **MR. BOUTROUS:** But the Supreme Court said in *Amchem*
8 that the Court needs to keep the absentees' interests closely
9 in mind, and look closely at that. And that, I think,
10 Your Honor -- these are individual people.

11 And I know the policy issues -- and one of -- one of the
12 issues -- I'm just going to jump right to it so I don't forget
13 to say it.

14 (Document displayed)

15 **MR. BOUTROUS:** Courts have said where there is a big
16 policy issue, where it's a new claim, where we have a situation
17 that -- in your opinion, you cited -- I believe it was Judge
18 Easterbrook in a decision --

19 (Document displayed)

20 **MR. BOUTROUS:** -- that talked about when you should
21 have a trial when there are multifactor tests. And Judge
22 Easterbrook in the Bridgestone/Firestone case said: Well, we
23 have something new, a new claim where we have not had the
24 experimentation by juries, different juries looking at the
25 situation. We have a societal issue of policy implications.

1 The Fifth Circuit said it in *Castano*, where it's an
2 immature legal claim, or a novel legal claim. And Judge Posner
3 said it in the *Rhone-Poulenc* case. We don't say we're going to
4 have the first jury to consider the issue decide it all at
5 once. We the individual juries -- and counsel's kind of
6 suggested this with her bellwether idea.

7 But you have -- let's have a jury trial as to these three
8 individuals. And see what a jury says. That would shed light
9 for both Uber, for others, for plaintiffs' lawyers, for
10 plaintiffs.

11 But, you don't say this is new. And this Court recognizes
12 significant challenges. Judge Chhabria recognized: Square
13 peg, two holes, or -- I can't remember exactly how he said it.

14 But --

15 **THE COURT:** Pretty close.

16 **MR. BOUTROUS:** Pretty close. But things don't quit
17 fit, that the law's outmoded. And I know the Court's trying to
18 work toward getting some resolution solutions. The answer
19 isn't -- it might not be good for the Plaintiffs.

20 The Supreme Court in the *Falcon* case --

21 (Document displayed)

22 **MR. BOUTROUS:** -- which the Supreme Court in *Dukes*
23 relied on, said there's this assumption that manna from heaven
24 will fall on the class members.

25 (Document displayed)

1 **MR. BOUTROUS:** And then Justice Ginsburg in *Amchem*
2 said: Sometimes those who were too enthusiastic about class
3 actions can do the most harm to the intent of the drafters of
4 Rule 23.

5 And so my -- I'm kind of jumping to what I really think is
6 an important point, is we recognize there are issues here. And
7 some individuals have these views. But the answer for the
8 judicial system isn't to say: We're going to decide it in the
9 first case for everybody.

10 When the law's uncertain, we're going to have one jury
11 decide this? What if the second jury would completely disagree
12 with the first jury? So the better way --

13 **THE COURT:** How does a jury differ from a judge in
14 that regard? Do you feel differently if it was a bench trial?
15 On a class action basis?

16 Is your objection to the class action nature being so
17 doubly precedential and dangerous that you don't get other
18 jurors to weigh in on it? Or is it more that you don't trust
19 the juries as opposed to a judge?

20 **MR. BOUTROUS:** No, it's really not focused totally on
21 the jury. We can learn a lot from juries. And I think *Castano*
22 or a lot of cases said, you know, the collective wisdom of
23 juries.

24 (Document displayed)

25 **MR. BOUTROUS:** But for example, when the Supreme

1 Court waits to decide a case, they usually wait until multiple
2 jurists have weighed in, multiple panels have weighed in.

3 **THE COURT:** I don't have discretionary jurisdiction.
4 I don't have cert. I wish I did. If I had cert power, my case
5 load would look a lot different. You all would be part of it.

6 **MR. BOUTROUS:** We would make your cut.

7 But really, the point is, though, Your Honor, it's an
8 analogy. That usually the way the judicial system resolves a
9 thing is we get the views of different juries on the issue, and
10 then sometimes that can maybe lead to the class actions later.
11 That's the bellwether idea.

12 But we don't say: Law's uncertain, this is frustrating,
13 significant challenges; let's have one jury decide it all in
14 one fell swoop.

15 That's why I think the best thing here is: Let's take it
16 one step at a time. It would shed a lot of light on things if
17 we had a trial with these Plaintiffs. And then, take the next
18 step after that. And everyone would learn a lot from the
19 process. It would be an important proceeding.

20 But it's really a risky gamble for the system to say:
21 We're going do it all at once, 160,000 people, and we'll decide
22 how --

23 **THE COURT:** If you're confident in your case, it
24 would be a good gamble. You're going to bind 160,000 people.

25 **MR. BOUTROUS:** Yes, I'm confident. But I am also,

1 you know, cognizant of the fact that there are the interests of
2 absent class members. There is the keeping -- applying the
3 substantive law correctly, which we would have to do during a
4 trial.

5 I am confident. I think we have the better of the
6 arguments, for many, many reasons. But at the same time, if
7 we're going to follow *Borello* and we're going to have that mix
8 and balancing of factors, and look at each individual, and
9 treat them as individuals who have their own rights, I don't
10 think we can have a big huge class action, or even some
11 multiplicity of subclasses. I just think it would be better to
12 come to a good resolution here. I know that's what the Court
13 is grappling with.

14 We mentioned at a prior hearing: How do we deal with
15 this? And I think it would be a significant contribution to:
16 Let's first just have a trial. And let's do it sooner rather
17 than later, rather than waiting, going -- having a class
18 certified. There would be appeals. What if we have a class
19 certified, and the whole thing gets overturned? That's not
20 going to really move things forward.

21 And so, I'm here with a plea for a sensible solution here
22 that I think really would --

23 **THE COURT:** There's even a better way to resolve
24 this.

25 **MR. BOUTROUS:** I know where you're headed with that,

1 Your Honor.

2 **THE COURT:** What's the ADR plan? I mean, then you
3 can tailor it -- you know, to what makes sense from a business
4 perspective, what makes sense from a risk-minimization
5 perspective. Not create unwanted precedent. Leaving it in the
6 hands of six, eight, nine, ten, 12 people.

7 **MR. BOUTROUS:** Well, it's very difficult. Again, I
8 mentioned this before. The business model, the platform --
9 Uber's doing this not to avoid obligations under the employment
10 laws, but to function the way it has. And it's been
11 successful, and the drivers, many of the drivers like it.

12 But on the ADR point, Your Honor, one of the reasons
13 courts say "Let's have a few trials first before we try to
14 resolve it all at once" is so, quite frankly, companies,
15 defendants, plaintiffs -- everybody can gauge the situation a
16 little bit better. And, and make sensible determinations.

17 And it would be -- I think it would be very interesting if
18 we just have -- we could do it much more quickly with
19 Mr. Colopy, with Manahan -- and I guess Mr. O'Connor is now out
20 so we'll probably have to change the name of the case. But, I
21 think we could learn a lot. And that does help parties work
22 towards solutions.

23 And that's why I think to do it all at once with all these
24 other cases pending, it just -- it can't be done, under the
25 rules.

1 **MS. LISS-RIORDAN:** May I respond?

2 **THE COURT:** Before we -- because it's getting late,
3 and I actually have a -- I mean, I can anticipate what your
4 response is. But what's going to be helpful for me here is
5 some specifics.

6 And one of the specifics I have is having to do with
7 mileage -- I mean, with the reimbursement claim.

8 **MS. LISS-RIORDAN:** Okay. Can I please respond to his
9 arguments? I have just a lot I want to say on that. I can
10 make it really brief.

11 **THE COURT:** Well, I want you to make it brief,
12 because I mean, as much as I appreciate the -- the view from
13 40,000 feet, the bottom line is I've got an adjudication here,
14 I don't have -- there's no precedent for saying: Well, I'm
15 going to deny class cert because this is an issue of importance
16 on developing law, and we should not allow this to be
17 adjudicated on such a high-stakes game as a binding class
18 action decided by a jury.

19 If people don't like that system, then we need to change
20 the rules. But the rules are the rules at this point, and --
21 and --

22 **MS. LISS-RIORDAN:** Right. That's what --

23 **THE COURT:** So --

24 **MS. LISS-RIORDAN:** None of what Mr. Boutrous said is
25 in Rule 23. But if I could just state something, just really

1 briefly.

2 And this goes to the issue that I know you talked about in
3 the summary-judgment order and that we talked about briefly at
4 the summary-judgment hearing about who decides the ultimate
5 issue, the jury or the Court. And I want to get to this in a
6 second.

7 But my point is, as we suggest in the papers, one thing
8 you can do -- of course, the Court has the power to decertify
9 at any time. You could cert -- if you believe we've met the
10 standards, you could certify the case. We could go to trial.

11 At the end of the trial, if you believe that the class
12 certification can't be maintained because of the way the trial
13 played out, and what factors -- how it actually looked at
14 trial, Uber could file something like a motion for directed
15 verdict after our case. Basically, it could file a motion for
16 de-certification. You could look at it then.

17 But the reason why I think this plays in significantly to
18 the question about who decides the ultimate issue, the jury or
19 the Judge, is because if you're making the decision as the
20 Judge, you would know what factors are going to be -- or as
21 part of your decision, you would determine what factors
22 actually are material and are not. And to extent that you
23 believe that the ultimate outcome of the case turns on factors
24 that were too diverse to maintain as a class action, you could
25 decertify it at that point.

1 And this is where I just want to note briefly about the
2 who decides, the jury or the Judge issue. I know that you
3 decided in the *Harris* case -- and in fact I have that. You
4 stated -- you quoted (As read):

5 "Under federal law as under state law, the existence
6 and degree of each factor regarding the status of a
7 person as an independent contractor or employee is a
8 question of fact, while the legal conclusion to be
9 drawn from those facts whether workers are employees
10 or independent contractors is a question of law."

11 Now, I understand that in your summary-judgment order, you
12 decided that under *Narayan*, the Ninth Circuit said this is --
13 since there are factors that need to be balanced, this should
14 be a question for a jury, citing Judge Lauritzen's -- I mean
15 the *Lauritzen* concurrence or dissent from the Seventh Circuit.

16 But I just want to point out, in the *Narayan* case, that
17 was reversing a grant of summary judgment for the defendants
18 where the plaintiffs hadn't moved for summary judgment. The
19 court was just saying: Oh, this is a fact issue. The Court
20 shouldn't have granted summary judgment for the defendant.

21 More recently than *Narayan*, I keep coming back to
22 *Alexander versus Fed Ex*. The Ninth Circuit held as a matter of
23 law that the drivers were employees.

24 And I know you are going to say: Well, isn't that because
25 the facts were just so strong in that case? But, think about

1 this. If you look at the Ninth Circuit decision, they never
2 say no reasonable jury could have found otherwise. Instead, I
3 mean -- in fact, they couldn't say no reasonable jury could
4 have found otherwise, because in fact someone did find
5 otherwise.

6 In fact, the original District Court, Judge Mueller, in
7 the MDL looked at these factors, and he (sic) weighed them, and
8 he decided that the drivers were independent contractors. When
9 the Ninth Circuit reversed --

10 **THE COURT:** Doesn't necessarily mean it was a
11 reasonable conclusion.

12 **MS. LISS-RIORDAN:** Well, we presume the
13 reasonableness of federal judges.

14 **THE COURT:** Oh, good, I like that.

15 **MS. LISS-RIORDAN:** The Ninth Circuit, the Ninth
16 Circuit said that it was weighing and balancing. And it found
17 that there are some factors that cut in favor of the
18 plaintiffs, and the Ninth Circuit said there were some factors
19 that cut in favor of Fed Ex.

20 And yet, it did the weighing and balancing, and decided as
21 a matter of law. Os --

22 **THE COURT:** I'm aware -- I'm aware of that. And I'm
23 aware of the fact that the Ninth Circuit did not articulate
24 exactly the role -- the standard it was applying, and whether
25 it was applying a no-reasonable-jury-could-find standard or

1 we-get-to-decide-as-judges standard.

2 But we do have the other case that's sitting there, was
3 not overruled, and is still good law. And it's also true under
4 California law. I think I've cited California cases on this
5 question.

6 In any event, I'm not going to revisit that. Now, if
7 Ninth Circuit between now and whenever brings some
8 clarification, obviously I'll follow it. But at this point I'm
9 not going to revisit the question whether it's a fact --
10 application of law or fact question that a jury versus judge
11 decides. I've decided that, and I'm not going to revisit that.

12 **MS. LISS-RIORDAN:** Okay. Well, whichever way you go
13 on that, may I hand up this -- this trial plan? And I have
14 blowups --

15 (Document handed up to the Court)

16 **THE COURT:** -- you give me the trial plan, let me ask
17 you this question.

18 **MS. LISS-RIORDAN:** Okay, it goes -- my point is --

19 **THE COURT:** Goes to the 2802 claim, reimbursement
20 claim.

21 **MS. LISS-RIORDAN:** Yes.

22 **THE COURT:** The reimbursement claim, what I'm trying
23 to find out is what it is exactly you are seeking. Are you
24 seeking something other than the IRS rate mileage
25 reimbursement, which is kind of a proxy?

1 And I know it's not perfect; it's not a perfect measure of
2 individual damages. But courts have said that that's a
3 reasonable and fair way to measure damages in driving cases.

4 Or, are you seeking all the other kinds of expenses that
5 were incurred from water bottles to mints to clothing, and
6 everything -- you know, whatever else? What is it -- because
7 obviously that may implicate issues of predominance,
8 manageability and everything else.

9 **MS. LISS-RIORDAN:** Okay.

10 (Document displayed)

11 **MS. LISS-RIORDAN:** So on the damages issue, if I
12 could have gone through the trial plan, but I think you want me
13 to just jump straight to it. I wanted to lay it out for you.

14 I've got a couple of alternatives. One is that we could
15 just seek those common damages, the mileage, which is
16 determinable from Uber's records. They keep in their systems
17 how many miles the drivers are transporting passengers. The
18 courts have accepted using an IRS reimbursement rate.

19 They also have evidence in their records of drivers who
20 were charged for phone use and data plans. So that's all
21 completely ministerially calculable.

22 So, we could just seek that. And that, I submit, are
23 going to be the over -- the mileage is going to be the
24 overwhelming damages in this case. And that's really the main
25 thing that we're seeking.

1 If the Court had some concerns about: What about all
2 those drivers out there who went to be reimbursed for their
3 bottled water for their unreimbursed tolls, for other things
4 that aren't ministerially calculable, an alternative that I
5 have suggested is that -- and again, damages can be bifurcated
6 from liability -- is that if liability is established, there
7 could be a -- a claims-made or a mini-trial process to
8 adjudicate those individualized issues.

9 So what I'm envisioning is that the class could be
10 notified in the notice that what's going to be sought for them
11 is their mileage reimbursement. And if they had any data
12 charges, that it's in Uber's records.

13 If they want to pursue additional expenses, there could be
14 a process for them to participate in this type of mini-trial
15 process. But that if they choose not do that, they're doesn't
16 with sticking with their mileage. Which, again, is going to be
17 the vast majority of their damages.

18 So I just lay out this mini-trial process as a
19 possibility, if the Court were concerned about our saying:
20 We're only seeking mileage for you; we're not going to seek
21 anything else for you.

22 So to the extent they decided they don't want to take that
23 extra step, the class will have then consented to they receive
24 whatever can be determined from Uber's records.

25 **MR. BOUTROUS:** May I --

1 **MS. LISS-RIORDAN:** And if I could just --

2 **THE COURT:** Yep.

3 **MS. LISS-RIORDAN:** I know you've shifted gears, but I
4 just had one last point that I was trying make before.

5 **THE COURT:** All right.

6 **MS. LISS-RIORDAN:** And it's part of the trial plan
7 that I have a blowup, and that I just handed up to you. My
8 request would be -- and I think this does fit into what I was
9 saying before about how you could see what trial looks like,
10 and if necessary, entertain a motion for de-certification if
11 you think that the ultimate resolution is going to turn on
12 factors that vary.

13 And that's this: I would request in the trial plan that
14 the way it would work is that we would put on the trial. The
15 jury would be given a special verdict form where they're asked
16 to decide how each of the *Borello* factors goes, so that even if
17 Your Honor disagrees with me that it's for the Court to do the
18 ultimate weighing and deciding what the result -- the outcome
19 of these factual determinations on the factors means, we would
20 have at least preserved it for appeal, and be able to argue
21 that the factors should have come out a certain way as a matter
22 of law.

23 So, again, that just -- that ties in with the trial plan
24 of being -- you can see what the trial looks like. You can
25 determine whether it's your decision or the jury's decision,

1 whether it appears manageable, after we've put on the evidence.

2 And then, ask the jury to decide the individual *Borello*
3 factors. And if you decide the jury also has to decide the
4 ultimate question, have them decide that, too. But break it
5 down so at least we have the verdict as to those factors.

6 Another point, I found it very interesting that in
7 Mr. Boutrous's comments a few moments ago, he seemed to suggest
8 the bellwether trial, which was an idea that I sprinkled
9 through the papers as another possibility.

10 The Court could -- another alternative --

11 **THE COURT:** He wants to do it before class
12 certification. You want to do it after you've established
13 liability.

14 **MR. BOUTROUS:** That's how we usually do it.

15 **MS. LISS-RIORDAN:** Remember, I wanted to move for
16 summary judgment, and you didn't permit me to move for summary
17 judgment.

18 Another way to handle this is also to let me move for
19 summary judgment. And when you do the analysis, you would --
20 as you're shaping the analysis, you could then determine what
21 is common, what's not common. Whether it's determinable on a
22 class-wide basis.

23 **THE COURT:** Common and not common, now. What is
24 harder to predict -- and this is where a little bit of
25 guesswork has to come in -- is whether the predominance factor,

1 how that weighs. I have a catalog now of which ones seem to be
2 common -- susceptible to common proof, which factors are not as
3 susceptible to common proof, the degree of differences between
4 them.

5 But then, a judgment has to be made. And that judgment
6 may well turn to certain extent on kind of your assessment of
7 lack of materiality of that factor.

8 **MS. LISS-RIORDAN:** Right.

9 **THE COURT:** How it might play out, how it might be
10 managed before the jury, if it gets to that point.

11 **MS. LISS-RIORDAN:** And you would know that better
12 once you see what it looks like at trial. And if you were
13 making the ultimate decision yourself, you would be able to
14 determine whether factors that aren't common are going to
15 matter in the decision anyway.

16 And I just want to point out, it's mentioned in our brief
17 the recent decision by the California Labor Commission deciding
18 that an Uber driver was an employee -- and of course, that's a
19 commissioner -- that's an agency decision. You have noted that
20 agencies do constitute a body of experience and informed
21 judgment to which courts and litigants may resort for guidance.

22 But the point is, is that decision, if you look at it,
23 didn't turn on the specifics of that particular driver. It
24 looked at the Uber system. It looked at the kind of factors
25 that we were looking at in these *Borello* factors. You know,

1 Uber set how they got paid. You know, I think it mentions that
2 they had the right -- she had the right to hire other drivers
3 if she wanted to.

4 If you look at that, and then you also look at the
5 Commission decision that Uber has cited before, the Altracki
6 (Phonetic) decision, if you look at both of these decisions
7 side by side, they didn't come out different ways because there
8 was something different about the Uber drivers involved in each
9 of them. They came out different ways because two different
10 factfinders reached different conclusion about the same basic
11 facts. And the fact that the Altracki claimant who was also
12 pro se raised -- didn't clearly raise the misclassification
13 issue. He was just trying to get paid for his work.

14 But the point of that is that I think that decision
15 bolsters the fact that when a factfinder sits down and looks at
16 the situation, what they rely on and what was material to that
17 outcome were factors that don't vary. It wasn't based on the
18 peculiar circumstances of Ms. Berwick.

19 **THE COURT:** Let me hear your comments on the 2802.

20 **MR. BOUTROUS:** Yes. First on 2802, Your Honor, let
21 me -- the telling part of this is that we would -- people would
22 have the option to have a trial on damages. And, Uber has a
23 right to a jury trial. The Seventh Amendment gives Uber a
24 right to a jury trial when someone's claiming damages.

25 So, one, you can't certify a liability-only class without

1 finding that predominance allows the class for the whole case.
2 That's the *Castano* decision from the Fifth Circuit, other
3 courts. You have to --

4 **THE COURT:** Why would that -- I mean, it does happen.
5 You know, courts do certify liability, leaving for a more
6 complicated claims-made or fact-finding basis, damages. I
7 understand it can be unwieldy, but it is done.

8 **MR. BOUTROUS:** There has to be a determination that
9 the entire case and claims meet Rule 23(a) and Rule 23(b)(3).
10 If that determination is made because there's been a damages
11 model, or some other process, that makes it a manageable
12 situation. Then you can have liability only in some other
13 proceedings. And, oftentimes parties agree to it. But that's
14 not what we're talking about here.

15 So this proposal (Indicating), one, it tosses out the
16 window the claims of many people that they might want to make.
17 Or alternatively it says: Well, people who want to have a
18 trial can have a trial on their damages.

19 That doesn't add efficiency; it's a waste of judicial
20 resources. It's a Frankenstein's monster of a proceeding. It
21 has not been briefed. It's not part of a trial plan.

22 This Court in the *Harris v. Vector* decision that we're all
23 citing noted that these sorts of 2802 damages created
24 manageability problems because it's a qualitative and a
25 quantitative analysis of what are necessary expenses.

1 And it's not --

2 **THE COURT:** What if it is primarily a driving case,
3 and as some courts have done, is allow the use of the IRS rate
4 as a proxy because it's so easy to administer, and it
5 theoretically encompasses many of these things, like gas,
6 depreciation, et cetera, et cetera?

7 **MR. BOUTROUS:** I don't think that solves the problem,
8 Your Honor. I don't think that is consistent with California
9 law.

10 And I don't think the named Plaintiffs can ask this Court
11 to certify a class where they would be saying: We're going to
12 either just give give up claims that other people might want to
13 make, or we're going to have thousands and thousands of
14 potential jury trials, which would defeat the whole notion for
15 class certification.

16 **THE COURT:** There is law about what you can give up.
17 If you give up too much, it implicates adequacy of
18 representation.

19 **MR. BOUTROUS:** Exactly.

20 **THE COURT:** But there are some cases that say if you
21 don't give up too much, and what you give up is in the best
22 interests of the class because you're not giving up that much,
23 but you are facilitating vindication via a class-action
24 vehicle, that may be okay. You may be still keeping with your
25 fiduciary duty. So, there's a judgment call as to how much

1 you're giving up.

2 **MR. BOUTROUS:** And that -- it's not been demonstrated
3 that they meet those standards.

4 And also on just the mileage, many of the transportation
5 parties and Uber partners already pay for driver expenses,
6 including mileage. So we'd have to figure out who those people
7 were through a class process.

8 And you can't use a trial by formula, as the Supreme Court
9 said in *Dukes*. There can't be some averaging and guesswork
10 and: Well, you know, we create a big pot of money and then
11 divide it up.

12 There has to be tethered to each individual, their actual
13 damages. That's what the *Comcast* decision said, that there
14 needed to be a class-wide damages model. There, they even had
15 an expert. And the Supreme Court said the expert's testimony
16 wasn't linking it to the actual injury.

17 People's rights can't change because it's a class action.
18 And Uber's rights can't be diminished because it's a class
19 action. That's what *Dukes* said; that's what *Amchem* said.

20 I think counsel's suggestion, though, on this, that --
21 this de-certification, this -- is really a big admission.
22 Because it's suggesting that the Court might determine that
23 there's too much variability.

24 As this Court I know is aware, in 2003, Rule 23 was
25 amended specifically to eliminate conditional certification.

1 Plaintiff was required now to make the showing that there could
2 be a fair trial that would be fair to the absentees, that would
3 be fair to Uber. And that predominance of common issues
4 existed; that there would be a fair class-wide damages model
5 that could work.

6 We haven't even talked about the arbitration issues. Most
7 of the drivers are subject to the 2014 arbitration agreement
8 that this Court said was an extremely close question in terms
9 of enforceability. That's up on appeal.

10 These three named individuals --

11 **THE COURT:** That could be carved out as a subclass or
12 as a non-class.

13 **MR. BOUTROUS:** It would be -- these three Plaintiffs
14 certainly can't represent those people who signed the 2014
15 arbitration agreement. That much is clear. They opted out.
16 The arbitration agreement's on appeal. What if we had a huge
17 class proceeding, and then we prevail on that extremely close
18 question on appeal?

19 And so this -- the rule of thumb I use, Your Honor, is if
20 it's so complicated and so convoluted that the efforts, the
21 shortcuts, the different things that are being proposed are so
22 unusual, then there shouldn't be a class action. At least, at
23 least, one that sweeps in so many people and so many varied
24 individuals.

25 **THE COURT:** Do you have any idea what percentage of

1 the 160,000 people are subject to the 2014 arbitration
2 agreement, as opposed to the 2013?

3 **MR. BOUTROUS:** Of the active drivers, it would be
4 most, if not all. I don't have the actual number. And again,
5 I hate to keep harping on this: This would have been something
6 that the Plaintiffs should have had to show, that there wasn't
7 variability. We can certainly provide the Court with that kind
8 of information.

9 And I should say, because I know we're probably running
10 short on time here, that this trial plan (Indicating)
11 traditionally would have been a major feature of the class
12 certification motion. Subclasses -- identifying the sub -- and
13 this -- I don't think this is an adequate trial plan. It
14 should show the issues, should show how the evidence would
15 become.

16 But, but we haven't had a chance to actually respond to
17 this (Indicating). I mean, I could go through it now, but I
18 have a feeling the Court's thinking maybe we're coming to the
19 end.

20 Would it be --

21 **MS. LISS-RIORDAN:** Your Honor, I submitted in chart
22 form -- these issues were all laid out in our briefing, but I
23 understand you asked for demonstratives. So I put it in chart
24 form.

25 And if I could just respond to some of what he said, I

1 would appreciate it, before we run out of time?

2 **THE COURT:** First of all, everything that you have
3 put in here is already in your brief? Is that what you're
4 saying?

5 **MS. LISS-RIORDAN:** I'm saying these charts. The
6 damages and the proposed subclasses.

7 **MR. BOUTROUS:** I was talking about the trial plan,
8 actually.

9 **MS. LISS-RIORDAN:** The trial plan. I'm explaining in
10 this first page where it introduces the trial plan --
11 everything about the subclasses, that's all -- that's all in
12 our briefing.

13 I'm just explaining to you today -- and I put it here just
14 to put it in -- because I have a blowup and I wanted to hand it
15 up to the Court -- is that the way the -- whether the Court
16 actually decides the ultimate issue, itself, or whether the
17 jury decides it could be relevant to how you see the
18 manageability of the trial.

19 The fact -- if you're making the decision of the ultimate
20 issue, then you'll be able to weigh whether varying factors are
21 even dispositive.

22 Can I respond now to some of these damages issues?

23 **THE COURT:** Yeah, quickly.

24 **MS. LISS-RIORDAN:** Okay. So --

25 **THE COURT:** But not so quick that the reporter can't

1 follow you.

2 **MS. LISS-RIORDAN:** Okay. I'll try to strike that
3 balance.

4 **THE COURT:** Briefly, not quickly.

5 **MS. LISS-RIORDAN:** One of the cases that we've cited
6 in our moving papers *Martins versus 3PD*. It's a recent case
7 we've had where the court -- it's a misclassification case
8 where the court bifurcated liability from damages, which we're
9 seeing happen a lot in these cases. And then --

10 **THE COURT:** Do you agree with the general proposition
11 that the predominance inquiry has to look at the case as a
12 whole, including looking forward to the post-liability phase,
13 damage-resolution process?

14 **MS. LISS-RIORDAN:** Well, it's not so clear. In the
15 *Martins v. 3PD* case, for instance, I mean, liability -- the
16 Court found that that was predominant, and adjudicated the
17 misclassification issue, and then said: We'll address damages
18 in a second stage. And what the court did was appointed a
19 special master to oversee the damages.

20 And so, what I'm suggesting here is that you could
21 bifurcate liability from damages, which is quite frequently
22 done. And for -- so, you didn't see my previous chart because
23 we didn't have a chance to go through it. But, I propose --
24 and it's in our papers -- a proposed Subclass I and
25 Subclass II.

1 The drivers who drove through transportation companies
2 such as Mr. Colopy --

3 **THE COURT:** Yeah. Actually, I saw that.

4 **MS. LISS-RIORDAN:** -- would be Class II.

5 **THE COURT:** I saw that. You had two subclasses.

6 **MS. LISS-RIORDAN:** Yes.

7 **THE COURT:** But, what about Mr. Boutrous's point:
8 That they have a right -- Uber has a right to a jury trial on
9 damages, so if you've got people in Phase II who want to claim
10 these extra things, they'd be entitled to have a full jury
11 trial on each one of those.

12 **MS. LISS-RIORDAN:** Yes. And going back to *Teamsters*,
13 the Supreme Court has said that mini trials is a way that
14 individualized issues can be adjudicated after common issues
15 have been adjudicated.

16 So what I've suggested I thought was actually a pretty
17 good balancing of things. Class members -- again, I think the
18 mileage is the overwhelming damage here. But class members
19 could be given the opportunity to come forward and put on these
20 mini trials if they want to get additional expenses
21 adjudicated. That would be optional. And to the extent they
22 decide not to do it, they'll have waived it, essentially.

23 For Subclass II, the drivers such as Mr. Colopy would have
24 to come on, perhaps, and have these mini trials in which
25 there's some adjudication if there's a potential offset. For

1 instance, if they got reimbursed for some gas or some of these
2 expenses. So, it's not necessary for Subclass I. It would
3 only potentially be necessary for Subclass II to have these
4 mini trials.

5 But, stepping back to look at the big picture here, and
6 the Court's thinking about the predominance and superiority
7 factors. Uber has -- where this hearing started out. Uber has
8 made a decision that its 160,000 drivers in California are all
9 independent contractors. It did no individualized inquiry an
10 analysis to say: Well, this group seems like employees; this
11 group seems like independent contracts. It just said across
12 board: They're all independent contractors.

13 In order for there to be any real way for that issue to be
14 addressed and vindicated for potentially these more than
15 100,000 drivers is through a class action. And for Uber to
16 say: Oh, you can't have a class action because we can pick
17 apart all these little differences -- that I submit are not
18 relevant to the appropriate legal analysis -- in order to
19 deprive the vast majority of these drivers from vindication of
20 these rights, as well as the State of California that has
21 established these rules, as well as complying competitors who
22 are being disadvantaged by Uber's taking advantage of ignoring
23 all employment laws, looking at the big picture, the Court
24 needs to weigh the superiority of letting this case go forward,
25 perhaps setting it up in subclasses, or allowing Uber to only

1 have to deal with whatever individual drivers go through the
2 trouble of actually bringing their own claims. I think that's
3 an important part of the overall 23(b) analysis.

4 And again, I submit that looking at the California Labor
5 Commission's decision, we've already seen a factfinder make
6 this conclusion in a way that's not materially different among
7 drivers.

8 I did also -- it's suggested in the papers, and so I put
9 it into this chart that I've handed up to you about the
10 potential subclasses. I think the main ones that perhaps are
11 called out but really only for damages purposes are those like
12 Mr. Colopy who drove through the transportation companies, and
13 those like Mr. Gurfinkel and Mr. Manahan who just contracted
14 directly and got their pay directly.

15 Another possible way that the Court might want to divide
16 up the subclass -- and again, I'm not suggesting it's
17 necessary, but it's just another factor that you might
18 consider -- is the question of who -- who drove more -- more
19 like a full-time employee, versus who didn't. So the drivers
20 who drove more than 30 hours a week, like Mr. Gurfinkel versus
21 the drivers who drove less than 30 hours a week like
22 Mr. Manahan.

23 I'll note that the *Fed Ex* case, the *Alexander versus*
24 *Fed Ex* case, the class was defined as full-time drivers. And I
25 also note that in Uber's charts, when they analyzed their 400

1 declarations, they had a column for whether they drove more
2 than 30 hours or not. So I think the parties are in some sort
3 of agreement on the fact that if you drive more than 30 hours,
4 you might look more like a full-time driver. At least if
5 you're driving more than 30 hours a week, it's your main thing
6 that you're doing.

7 So, that's just another possible way it could be split up.
8 I'm not suggesting that it needs to be. The Court in the
9 summary-judgment decision said it doesn't appear to matter how
10 much you drive, because the question is whether you're under
11 Uber's control while you're driving.

12 But I just throw that out there, if the Court thought that
13 that was an appropriate way to divide things up.

14 **MR. BOUTROUS:** May I address those subclass points,
15 Your Honor, briefly?

16 **THE COURT:** Yeah, but I want to ask you one question.

17 **MR. BOUTROUS:** Sure.

18 **THE COURT:** Is there any disagreement -- I know
19 you've pointed out disagreement on one of the X factors that
20 she had on her chart, which is the helpers, the acknowledged
21 helper thing. And there's two where she seems to agree that
22 there's at least an issue about commonality.

23 Is there disagreement on the other Xs? I don't know if
24 you have your chart.

25 **MR. BOUTROUS:** Yeah --

1 **THE COURT:** I didn't think there was, but I want to
2 know what your position is.

3 **MR. BOUTROUS:** Yeah, let me get the other chart up
4 there.

5 (Document displayed)

6 **MR. BOUTROUS:** I don't agree that -- let me go up and
7 take a look at the chart.

8 I think we do have disagreement on some of these. I don't
9 think that the -- the factor regarding individuals who are
10 using entrepreneurial skill or managerial skill are common.
11 That -- I know the word "opportunity" is in there.

12 But where we have individuals, some who are using
13 strategic choices, they're building their own business, they're
14 looking at the relationship in a much different way than
15 someone who is looking at it like -- just drive, more like --
16 they claim, like Mr. Colopy and others, as an employee. So I
17 don't think we agree on that one.

18 And the length of time -- here's one, Your Honor. This is
19 the perfect one. The length of time for which the services are
20 to be performed. How can that be common for all drivers? When
21 they -- even the individual drivers differ back and forth.
22 Where, where some people drive, you know, one hour a week; some
23 drive 30 hours a week.

24 Counsel's even switched positions on what she -- what
25 they're counting as driving. The latest briefing suggests it's

1 the on-trip. And I looked at -- "on-trip" -- at Mr. Colopy.
2 He didn't drive -- I think one time he had 18 hours. Maybe he
3 had 30 hours in one week. But he wouldn't even meet that
4 subclass.

5 **THE COURT:** Let me ask you a question. I think maybe
6 we all have differing, varying interpretations of what this
7 factor means: Length of time for which services are being
8 performed.

9 Does that mean actual time driving on any particular day
10 while on service? Does the that mean the length of time of the
11 relationship, how long you've been, quote, working or
12 associated with --

13 **MS. LISS-RIORDAN:** Your Honor --

14 **MR. BOUTROUS:** Well, I think this is one of the
15 factors where, again, not trying to read the Court's mind, but
16 it would qualify under what the Court suggested in the
17 summary-judgment motion: It's a bit outmoded. Because this is
18 a somewhat ephemeral relationship.

19 To call it indefinite and permanent, when, as we were
20 discussing, people can sign up for the app, they can drive
21 whenever they want, they can stop driving. But, different
22 people work different amounts of time.

23 I think it would really be a tortured view of that factor
24 of the length of time worked, that we would say everybody's the
25 same when some people drive two hours a week, some people drive

1 ten; some people drive ten one week, five the next week. The
2 length of time worked is not uniform here. It varies wildly.

3 **THE COURT:** Depends on how you define "length of
4 time." If you're referring to part-time versus full-time
5 versus very part-time, that's one thing.

6 If you're talking about how long have you been with this
7 company or associated with this company, that's --

8 **MR. BOUTROUS:** That varies, too.

9 **THE COURT:** That's different.

10 **MR. BOUTROUS:** That varies too, Your Honor.

11 **MS. LISS-RIORDAN:** Your Honor, the case law on length
12 of time is that you don't even look at the individual and how
13 long they drove. You -- you look at whether it's an open-ended
14 relationship, or limited. Again, the classic --

15 **THE COURT:** Because most contracts that you sign is a
16 contract for a specific job in a specific time frame,
17 et cetera, whereas an employment thing is open-ended.

18 **MS. LISS-RIORDAN:** Exactly. And I believe we have
19 the cases cited in our brief, that the mere fact that someone
20 worked for a short period of time but others worked longer --

21 **THE COURT:** All right. So, no agreement there. What
22 else do you disagree with?

23 **MR. BOUTROUS:** Again, I already articulated my
24 disagreement with the opportunity --

25 **THE COURT:** Right.

1 **MR. BOUTROUS:** The other thing I think is really
2 interesting, Your Honor, because Ms. Riordan is supposed to be
3 representing the drivers. But, this notion that the level of
4 skill is uniformly low.

5 I've had a lot of drivers who -- on the Uber app and other
6 companies over the years. It varies widely in how people treat
7 their -- and we've got different drivers on different
8 platforms.

9 (Reporter interruption)

10 **MR. BOUTROUS:** It varies widely between different
11 drivers. And I think they -- Ms. Riordan's putative clients
12 would strongly disagree with her if she told them all that they
13 had a uniformly low level of skill.

14 **THE COURT:** It's not their skills. Whether the
15 services rendered requires a certain skill. You may be -- some
16 people may have various class of drivers, and drive a truck and
17 everything, but this job only requires you to drive a car, a
18 Class A or 1 -- or whatever it's called -- license.

19 **MR. BOUTROUS:** But I --

20 **MS. LISS-RIORDAN:** And again, in the *Fed Ex* case,
21 again, that was found to be a common factor. It was a low
22 level of skill, even though they had to have a commercial
23 license. Having a license to drive was not a high skill.

24 **MR. BOUTROUS:** But, I -- well, I disagree with that
25 interpretation. And I disagree that that factor is common to

1 all people. We have different -- we have the UberX, we have
2 Uber Black. So we have great variability.

3 And with respect again to the factors, the
4 right-to-control factor, we don't disagree that that's uniform,
5 as I mentioned at the outset.

6 **THE COURT:** You don't disagree? Or you --

7 **MR. BOUTROUS:** We don't agree that it's --

8 **THE COURT:** You said "disagree." That's good; let me
9 check that one.

10 **MR. BOUTROUS:** Oh, no. If I say it, it's done.
11 But -- and the other thing is that counsel just didn't include
12 all the factors in the chart. So, so I don't --

13 **MS. LISS-RIORDAN:** I did. Check *Borello*. They're
14 all in there.

15 **THE COURT:** All right. Okay. So let's go--

16 **MS. LISS-RIORDAN:** Your Honor --

17 **THE COURT:** We've got to move on.

18 **MS. LISS-RIORDAN:** Okay. Your Honor, also, it's in
19 our brief that alternatively -- remember, it's up at the
20 California Supreme Court now. In addition to *Borello*, there
21 are the other IWC factors.

22 And a case just came out Monday from a court in southern
23 California, following a remand after *Ayala*, certifying a class
24 of exotic dancers claiming misclassification under the IWC
25 standard, which is even more employee-friendly than the *Borello*

1 factors.

2 **THE COURT:** How would you briefly summarize the IWC
3 standard? How is it different than *Borello*?

4 **MS. LISS-RIORDAN:** So if you look at the first prong
5 of the IWC standard, exercising control over the wages, hours,
6 or working conditions. Clearly, Uber exercises control over
7 the wages. It sets the rates, and says what part the drivers
8 get and what part Uber gets. Doesn't over hours, but --
9 there's an "or" in there, not an "and."

10 And working conditions I would submit is the same thing,
11 for all the reasons that we've argued: That they set this up;
12 the drivers have the same ability to drive when they want or
13 not to drive.

14 And then the second factor I think is what is considered
15 the broadest, is: To suffer or permit work, which is really
16 the same standard as the federal courts use under FLSA, the
17 economic realities analysis.

18 And I think in one of your cases, it might have been the
19 *Harris* case, you noted that there's similarity -- yes, it was
20 (As read):

21 "The definitions for 'employee' and 'employ' under
22 the FLSA and state law manifest a consistency which
23 warrants similar interpretation."

24 And that's why we noted briefly the DOL's recent guidance
25 in a footnote which goes through the factors, the economic

1 realities factors, which are strikingly similarly, really, to
2 the *Borello* factors. But then goes through and has a lot of
3 the same discussion we've had today, but then concludes: Thus,
4 most workers are employees.

5 So, I think under the IWC --

6 **THE COURT:** If I recall, doesn't the DOL factor
7 emphasize a fair amount on the -- where you contact with
8 others? If you hold yourself out and you have relationships
9 with other parties than the one putative employee -- employer?
10 I thought that was one of things that came out of that.

11 **MS. LISS-RIORDAN:** It's one of the factors, but
12 again, it's sort of -- I mean --

13 **THE COURT:** It's like the distinct business factor.

14 **MS. LISS-RIORDAN:** Yes. Yes. There's not really a
15 big material difference. The FLSA test is generally considered
16 to be very broad. Courts have said that the economic realities
17 test is the broadest notion of employment there is.

18 So, anyway, the point is that there's also the IWC to
19 think about. And the case that just certified under the IWC is
20 the *Salazar versus VIP Showgirls* case. It was just decided --
21 tentatively decided on Monday, in Superior Court in
22 Los Angeles.

23 **THE COURT:** I'm going take this under submission,
24 obviously, at this point. And, let's move on to -- we're going
25 to do a consolidated case management, serially.

1 **THE CLERK:** Calling additional Case C 14-5200,
2 Mohamed versus Uber, and 14-5241, Gillette versus Uber.

3 Counsel, please come to the podium and state your name for
4 the Record.

5 (Reporter interruption)

6 **THE COURT:** Actually, technically -- we don't have a
7 case-management conference in O'Connor, technically, right?

8 **MS. LISS-RIORDAN:** We do. We submitted a CMC
9 statement.

10 **MR. MAYA:** Theodore Maya for Plaintiff Mohamed.

11 **THE COURT:** Thank you.

12 **MS. HO:** Laura Ho for Plaintiff Gillette.

13 **THE COURT:** Thank you.

14 **MR. LEE:** Andrew Lee For Plaintiff Gillette.

15 **MS. HAMILTON:** Sarah Hamilton for hirees. And my
16 colleague, Nicole Baarts.

17 **MS. LISS-RIORDAN:** Plaintiffs should stay on this
18 side? Or move everything?

19 **THE COURT:** No, that's all right. You can stay
20 there.

21 **MR. BOUTROUS:** Plaintiffs done? Theodore Boutrous
22 for Uber.

23 **MR. FLIEGEL:** Ron Fliegel, Your Honor, Littler
24 Mendelson, for Uber.

25 **THE COURT:** All right. Well, I'm not sure what there

1 is to do in O'Connor at this point until, obviously, I decide
2 this -- where we're going on the class cert.

3 So I don't know if there's anything -- obviously, you've
4 submitted your idea of a trial plan.

5 And you haven't had a chance to respond to that. But,
6 we've got to get to first base first, seems to me.

7 **MR. BOUTROUS:** Your Honor, I think that's right. We
8 need to go through this process. If it would be okay with the
9 Court, we would like to submit a brief response to the trial
10 plan that was submitted today.

11 **THE COURT:** I mean, that's fair, since -- you know,
12 if you want to submit something in the next couple of days,
13 short, no longer than we received, I think that would be fair.

14 **MR. BOUTROUS:** Thank you, Your Honor.

15 **MS. LISS-RIORDAN:** And remember, as noted in our
16 papers and as Mr. Boutrous picked up on today, the possibility
17 of bellwether trials is in there. The Court could -- we could
18 try the three lead Plaintiffs, and then you could see how it
19 turns out, whether it's common or not.

20 Or you could let me file a motion for summary judgment and
21 decide it as a legal matter. But those are other
22 possibilities.

23 **THE COURT:** Let me ask you then, so, sounds like --
24 are you amenable to a bellwether individual trial preceding any
25 class cert?

1 **MS. LISS-RIORDAN:** Well, I had suggested that before,
2 as a possibility. But the way I suggested it is that the Court
3 could have -- could certify the class. And, we have cases
4 cited for bellwether trials in class actions.

5 You could certify the class; we could try the three lead
6 Plaintiffs. Each side could put on a manageable number of
7 witnesses for each, you know, five to ten, say, so it's
8 manageable.

9 If the Court, after seeing what the trial looks like,
10 decides that the factors are too diverse and I'm wrong about
11 all of this, then you decertify. And it's just based on those
12 three.

13 So, that is part of the trial plan that I noted in the
14 papers and in this chart.

15 **THE COURT:** So, the possible outcomes of a bellwether
16 trial, while -- if -- you're saying assuming there is a
17 certification, would be to determine, one, whether there should
18 be de-certification.

19 And if not, then what? I'm trying to think. If you
20 prevail, what does that mean? Then what happens? What's the
21 next step?

22 **MS. LISS-RIORDAN:** Well, if I prevail, you could then
23 determine whether the result is applicable to the class. Which
24 is why it's slightly is easier if you make the ultimate legal
25 conclusion, yourself.

1 But that's also why I suggested that following our
2 presentation of our case, Defendant could likely move for a
3 directed verdict; they could move for de-certification.

4 So whether you decide it yourself or have the jury decide
5 it, you could make a decision before the ultimate decision is
6 decided about whether the evidence was such that it could, in
7 fact -- like I'm arguing and you would at that point have
8 initially -- concluded could be decided on a class-wide basis,
9 or instead, whether the actual material facts are so different
10 that it can't apply to a class.

11 So, I'm saying you could see what it looks like at trial.

12 **MR. BOUTROUS:** I don't think that approach would be
13 consistent with Rule 23, because of the conditional
14 certification. And the whole idea is that the named Plaintiffs
15 would be representative, and we'd have a class action trial.

16 What I do think -- seems like we're actually very close.
17 I don't know why the Court would have to go through this
18 monumental effort about deciding the class certification issues
19 if we have the trial on these first three individuals.

20 And what the bellwether cases actually say is sometimes --
21 what the manual for complex litigation says is that the
22 bellwether trials are often helpful in determining the next
23 step, whether there could be a class certified in a subsequent
24 case. So it's definitely meant to inform the Court on those
25 issues, but it's not --

1 **THE COURT:** Also meant to inform the parties about
2 settlement.

3 **MR. BOUTROUS:** Exactly. And other issues, and see
4 how it comes out. So I think that is -- it's a sensible
5 approach. You can't certify the class first and then we would
6 have, like, sort of a trial that would be part class
7 certification hearing.

8 But it would definitely shed light going forward, if at
9 some point the Court would say: Well, you could never have a
10 class in the next case. It might help you, or maybe you would
11 disagree with me.

12 **THE COURT:** What's your view of that? Of A
13 sequential --

14 **MS. LISS-RIORDAN:** Well, a couple points. One, when
15 I raised something similar before, I think the one-way
16 intervention doctrine was brought up. Of course, Defendants
17 can waive the one-way intervention doctrine.

18 But I submit that the better way to do this to protect the
19 interests of the class is that you certify, and then under Rule
20 23(c)(1)(C), the Court can certify -- can modify the class
21 certification order at any time.

22 So you could decertify, if after seeing how these trial --
23 the trial looks like --

24 **THE COURT:** Sounds like you're not amenable to a
25 pre-class-cert bellwether trial.

1 **MS. LISS-RIORDAN:** Well, if there are certain
2 protections in place for the class, perhaps -- there are a
3 whole other host of issues that we haven't gotten into today
4 that would be -- that could be prejudicial or problematic if a
5 class isn't certified soon, if we did this whole trial on the
6 merits first.

7 **THE COURT:** Are those limitations issues? Or what
8 kind?

9 **MS. LISS-RIORDAN:** Well, I mean, there's protection
10 of the class. If there's a class certified and I'm counsel for
11 the class, the class would have various protections.

12 There's also the issue of follow-on cases, which we've had
13 some discussion about. If this class isn't certified, someone
14 else can swoop in get a class certified. And that's something
15 that the courts have looked at.

16 So while I'm not using the term exactly "conditional
17 certification," what I'm saying is that if the Court has any
18 doubts -- and I submit, based on what we've argued today and
19 what we've presented --

20 (Reporter interruption)

21 **MS. LISS-RIORDAN:** If the Court has any doubts that
22 what I presented today and what I've argued does not allow for
23 certification of a class -- but, I submit that I have met the
24 standard. But if the Court has any doubt, you can know that
25 you're always free to decertify at any time, or to modify the

1 class certification order at any time. And that can be after
2 we put on our evidence.

3 And the bellwether -- and we cited a few cases on
4 bellwether trials. You can have a class certified, and have
5 bellwether trials proceed as part of a class certification.
6 And then after you see the evidence, decide whether the result
7 is going to apply to the class or not.

8 That's why I say it's easier to do that if the Court is
9 the one making the conclusion.

10 **THE COURT:** I thought you were talking about
11 bellwether trials are phase two. That is, if there is class
12 certification and you prevail on liability, then use bellwether
13 trials as a way to resolve phase-two damages issues. That is a
14 very familiar process.

15 I've never heard of certifying a class, then having a
16 bellwether trial to see whether I was actually right in
17 certifying the class. I just -- that doesn't sound very
18 efficient me.

19 **MR. BOUTROUS:** I've never heard of that either,
20 Your Honor.

21 **MS. LISS-RIORDAN:** Well --

22 **THE COURT:** And I can only decertify in the -- like
23 you said, during trial. I mean, if I can decertify during
24 trial on the merits, why not just go to trial?

25 **MS. LISS-RIORDAN:** Well, go to trial, and see what it

1 looks like. I'm contending that all these differences that
2 they're putting out there are not really going to be material
3 to the ultimate outcome. And, maybe the Court will understand
4 that better once you see it. A lot of times, courts say that.

5 **THE COURT:** Well, I mean, there is an inherent
6 problem. I'll concede that to a certain extent, the Court has
7 to do a bit of forecasting and make some assessment, given the
8 predominance inquiry, into how it's going to play out, how much
9 variation in proof there's likely to be, how manageable it's
10 likely to be, whether it predominates or not. But it is a task
11 that the Court is charged with. So, you know --

12 **MR. BOUTROUS:** Your Honor, one thing, too. On the
13 factors on predominance, too, I want to make sure I did not
14 contest the variability of any factors.

15 One, you know, the alleged employers' -- employees'
16 investment in equipment varies widely. There may be others.
17 So I will double-check.

18 **THE COURT:** I'm aware of that. You've probably --
19 43, Page 43, whatever it is --

20 **MR. BOUTROUS:** Yes.

21 **THE COURT:** -- table of contents, and I did read it
22 all.

23 **MS. LISS-RIORDAN:** The point is that Uber didn't pay
24 for any of it. Even drivers like Mr. Colopy --

25 **THE COURT:** I understand.

1 **MS. LISS-RIORDAN:** They -- they pay rent.

2 **THE COURT:** I'm not going to argue it.

3 **MS. LISS-RIORDAN:** Yes.

4 **THE COURT:** I understand it's relative, et cetera,
5 et cetera. So, I understand the issues.

6 So in terms of case management, at this point, unless the
7 parties wants to stipulate to some kind of alternative
8 procedure, I intend to just go forward, rule on this, see --
9 you know, throw the dice. Chances are a higher court will have
10 a second look at whatever I do, and we'll see, and we'll just
11 proceed.

12 **MR. BOUTROUS:** That sounds like the right way to go,
13 Your Honor.

14 **THE COURT:** Okay. So in terms of the Mohamed and
15 Gillette cases, I mean, we've got discovery; I have allowed
16 discovery. And I've allowed limited discovery in the Mohamed
17 case, correct?

18 **MS. HO:** That's correct, Your Honor.

19 **THE COURT:** And I don't see a need to, you know, stop
20 discovery from moving forward. I know there's a Rule 12, there
21 was additional Rule 12 practice in -- in the case? Is there
22 something else? Is there something pending?

23 **MR. BOUTROUS:** That's correct.

24 **MS. HO:** There's a -- sorry, Your Honor.

25 For the Plaintiffs, Plaintiff Gillette has filed a motion

1 for leave to file another complaint. And our understanding is
2 Uber's indicated it will have Rule 12 motions, but nothing has
3 been filed yet.

4 **THE COURT:** All right. I don't see -- well, and the
5 proposed -- remind me what the proposed amendment is. Is that
6 to add --

7 **MS. HO:** That is to add three additional Plaintiffs.
8 And also to add hirees into the Gillette complaint.

9 I believe just today, or last night, we received Uber's
10 opposition in which they appear to only oppose the addition of
11 one of the Plaintiffs, but we'll have a chance to reply. And
12 it's set for hearing for August 27th.

13 **THE COURT:** All right. Well, what is your proposed
14 -- I know the Defendants want to stagger discovery, and you're
15 opposed to that. What is your discovery plan at this point?

16 **MS. HO:** We don't think that there needs to be any
17 intervention right now on discovery. We think that discovery
18 should just proceed. Today we'll be serving an initial set of
19 discovery.

20 And we think there should be no limitations on discovery
21 at this point, in the Gillette case.

22 In the Mohamed case, the Court's order indicated that it
23 would be limited to Mohamed, himself. The discovery in that
24 case.

25 **THE COURT:** All right. You have no issues there, in

1 terms of that scope, since it's -- since the purpose of that is
2 to replicate, sort of track what discovery would have been
3 permitted under arbitration, right?

4 **MS. HO:** Correct, Your Honor. The Plaintiff Mohamed
5 is not seeking any sort of revision of that order or anything.

6 **MR. BOUTROUS:** Your Honor, I would, I guess, make
7 one -- one further plea, to just stay discovery. Because I
8 think in both cases, we've filed a motion for stay in the Ninth
9 Circuit.

10 In Mohamed, it seems to me inconsistent with our right to
11 appeal and the arbitration rights in the FAA to have discovery
12 go forward unless it's extremely narrow, the way it would be in
13 arbitration.

14 **THE COURT:** But you did seek a stay from the Ninth
15 Circuit.

16 **MR. BOUTROUS:** We have motions for stay pending in
17 that. We just filed that -- I'm losing track of time --
18 yesterday or today. So we have that pending.

19 And I think in both cases, it makes much more sense to
20 just stay everything, and let's get a resolution --

21 **THE COURT:** Except I made an assessment on your stay
22 to me of what the probabilities are. If I thought a stay were
23 warranted in all events because of the reasons you stated, I
24 would have granted the stay. But I didn't grant the stay.

25 And so if I'm not granting the stay, at least with respect

1 to Gillette, I don't see a reason not to proceed until I'm told
2 otherwise by a higher authority.

3 **MR. BOUTROUS:** And if I can just get clarification on
4 when you stated that it would be our discovery that would track
5 what would be allowed in arbitration --

6 **THE COURT:** In Mohamed.

7 **MR. BOUTROUS:** In Mohamed.

8 **THE COURT:** Yeah.

9 **MR. BOUTROUS:** Then we can focus on that narrow
10 track, and then --

11 **THE COURT:** But I did grant a partial stay in that
12 case.

13 **MR. BOUTROUS:** Yes. Thank Your Honor.

14 **THE COURT:** But Gillette, I think you ought to
15 proceed. And obviously, you know, it ought to proceed in a
16 reasonable way. Because what you're looking for, once we get
17 beyond the 12(b) stage, the next major event is class
18 certification, which you are proposing to be 225 days after
19 ruling on motion to leave.

20 Is there some reason why 225 days?

21 **MS. HO:** It --

22 **THE COURT:** Especially since there's going to be -- I
23 assume whatever discovery occurs in these cases, there's going
24 to be -- not replicated; it's going to be shared discovery?

25 I mean, to the extent there's anything that's done that's

1 useful, and it's relevant to one case or the other, and it's
2 not going to be --

3 **MS. HO:** Yes, Your Honor; you're referring to the
4 O'Connor cases?

5 **THE COURT:** O'Connor and --

6 **MS. HO:** Yes.

7 **THE COURT:** Well, you've got the Price case in L.A.
8 I don't know what coordination -- I know there's other counsel.
9 But I'm hoping that everybody's not going their own way, and
10 asking for the same discovery five times over.

11 **MS. HO:** No. That's not the plan at all. I think
12 the parties are in agreement, we'll be efficient and use
13 discovery that's already taken place and where it's
14 appropriate. But there are different claims in the case, so
15 there will be additional discovery as well.

16 **THE COURT:** Yeah, yeah, no, I understand. There's a
17 different set of claims in your case. But, 225 days.

18 **MS. HO:** That's a timeline that the parties agreed
19 to. I think it's a -- it's meant to be a reasonable time to
20 make sure that we can get discovery done and present class
21 certification.

22 **MR. BOUTROUS:** And it may give Your Honor time to see
23 what the Ninth Circuit does.

24 **THE COURT:** And, did I allow a sixty-day gap between
25 opposit- -- you know, filing of Rule 23 motion, and opposition?

1 Did we have such an extended discovery -- I mean a briefing
2 schedule in O'Connor? I can't remember.

3 We did?

4 **MR. BOUTROUS:** That was -- I'll let you address that.
5 That was, I think, right before my time.

6 **MS. LISS-RIORDAN:** You did, because they needed all
7 that time to gather the affidavits. So, yes.

8 **THE COURT:** All right. Well, I will -- I will keep
9 these proposed dates in mind. Seems a little long to me, but
10 maybe there's some warrant for that.

11 **MR. BOUTROUS:** They're pretty complicated issues,
12 Your Honor.

13 **THE COURT:** All right. Any -- what about anything
14 else that we need to discuss?

15 You do have an ADR phone conference set for October 8th?
16 Is that right?

17 **MS. HO:** That's right, Your Honor.

18 **THE COURT:** And what's your anticipation? Are you
19 anticipating any process coming out of that phone conference?

20 **MS. HO:** I -- I think that we will have the phone
21 conference. We do not have any anticipating of a process at
22 this point. But the Plaintiffs are always open to discussions
23 of ADR. And we've indicated that to the Defendants.

24 **MR. BOUTROUS:** We're always open to discussion,
25 Your Honor. But as I've said before, because these claims go

1 after -- challenge a fundamental aspect of the business model
2 of the company, it's not really conducive to traditional ADR.

3 **MS. HO:** Although from the perspective of Plaintiff
4 Gillette and our claims, our contention is that that
5 determination is not necessary, meaning the independent
6 contractor/employee determination is not a necessary
7 determination for resolution of the background-check claims.

8 **THE COURT:** Background-check claims. But your PAGA
9 claims, it would be.

10 **MS. HO:** That's a different issue; yes, Your Honor.

11 **THE COURT:** Right. So it's possible to settle the
12 background-check claims.

13 **MR. MAYA:** Correct.

14 **THE COURT:** Isn't that worth exploring?

15 **MR. BOUTROUS:** Well, Your Honor, I never like to take
16 anything off the table. I'll definitely take a look at all
17 this.

18 I have not focused as much on the -- with everything else
19 going on. We've got time before that conference. But I pledge
20 to look at everything closely.

21 **THE COURT:** All right. Well, I would urge you to
22 have a meaningful ADR phone conference. And if you want a
23 process here such as a Magistrate Judge settlement conference,
24 let me know, and we can get that -- or whatever you choose.
25 Whether it's private mediation, court or whatever. But, we're

1 at your service if you're interested in any court-sponsored
2 program.

3 **MR. BOUTROUS:** Thank you, Your Honor.

4 **THE COURT:** All right?

5 **MS. HO:** Thank you, Your Honor.

6 Just one scheduling issue.

7 **THE COURT:** Yeah.

8 **MS. HO:** I think the deadlines we proposed, the
9 parties had only one difference. And that was the deadline for
10 the initial disclosures. The Plaintiffs proposed August 20th,
11 and the Defendants proposed September 7th.

12 The case has been going on for quite some time. And we'd
13 like to get the initial disclosures completed.

14 **THE COURT:** Is there some reason to wait until
15 September 7th?

16 **MR. BOUTROUS:** Just needed a little bit more time,
17 Your Honor. Didn't seem like a huge difference, but -- the
18 timing at the end of August. And so given everything that's
19 going on, given the arbitration, we would appreciate just a
20 little bit extra time until September 7th.

21 **THE COURT:** All right. Well, given the fact that we
22 now have a 12(b) motion and it's going to take some time to
23 resolve that, and if you're going to get this length of time
24 before you file class cert or something akin to that, I don't
25 see what two weeks is going to do.

1 So, we'll do September 7th, although that is Labor Day.

2 So if you're going to come to work on Labor Day, that's fine.

3 **MR. BOUTROUS:** That might spark us to do it a little
4 earlier.

5 **THE COURT:** You might have to get it in on September
6 4th, I think, is the Friday before. Okay?

7 **MR. BOUTROUS:** Thank Your Honor.

8 **MS. HO:** Thank Your Honor.

9 **THE COURT:** All right. Thank you.

10 **MR. MAYA:** Thank you.

11 **THE COURT:** And then, in the Yucesoy matter, we've
12 got now -- you're going to get back to me on a hearing because
13 that seems like a predicate, before I can do anything more, our
14 mini trial.

15 **MR. BOUTROUS:** Yes.

16 **THE COURT:** Whether it's here or Istanbul. And, you
17 know, they've raised again the issue of an early summary
18 judgment. But I think the one-way intervention problem is --
19 is always extant there. So --

20 **MS. LISS-RIORDAN:** Although, I thought I heard Uber's
21 counsel saying that maybe liability should be adjudicated
22 before class certification. And I think the Massachusetts case
23 law is different from California in that --

24 **THE COURT:** Well, and I will say, you know, it seems
25 to be more lenient vis-à-vis the employee, at least the way

1 some of the cases -- the way it's been articulated, but I don't
2 know whether that dictates the outcome or not.

3 Do you have any thoughts, if and when we get past -- I
4 mean, it's a little premature because I've got to see where
5 we're at on this. But if we get past the question of
6 arbitration, do you see any other different path for this case?

7 **MR. BOUTROUS:** Than --

8 **THE COURT:** Than the other cases.

9 **MR. BOUTROUS:** Yeah, I mean, we have -- I don't --
10 didn't mean to suggest that I was giving up on
11 one-way-intervention arguments. Not sure what you are
12 referring to.

13 But, but with the Massachusetts claims, I think there were
14 all sorts of other issues we planned to raise, to the -- I
15 guess the summary-judgment motion or the plea for the quick
16 resolution.

17 But, Your Honor, we'll take a look and if there's some
18 other different path -- I was just assuming we would go down
19 the -- the similar path, and follow the normal rules.

20 **MS. LISS-RIORDAN:** The point that I raised, and I put
21 it in our CMC statement as well as the earlier motion for
22 summary judgment that I filed that you told us to hold off on,
23 in Massachusetts there is a -- I recognize that there is a
24 significant issue out there.

25 And it was recently certified to the Massachusetts Supreme

1 Judicial Court in our Massachusetts *Fed Ex* case, and then was
2 withdrawn because of an unrelated appellate decision, as to
3 whether or not the expenses are reimbursable.

4 So my proposal was that some of these -- the most
5 significant issue in the Yucesoy case I really think is whether
6 the expenses are reimbursable under Massachusetts law. I was
7 proposing that rather than waiting until we get through this
8 whole process, the Court might take that up earlier. Because
9 you might consider that that should be certified to the SJC
10 just as it was certified in the *Fed Ex* case.

11 And if we have to wait until we get past discovery and
12 class certification and summary judgment, I just -- I just pose
13 the possibility of putting that more up front, because that's
14 really going to get more to the heart of this case.

15 **THE COURT:** You're saying that there's a key legal
16 issue --

17 **MS. LISS-RIORDAN:** Yes.

18 **THE COURT:** -- that doesn't require factual
19 adjudication that's under Massachusetts law, about the
20 reimbursability of expenses?

21 **MS. LISS-RIORDAN:** Yes. Exactly. It's a
22 somewhat-open issue right now. The Federal Court in the
23 *Schwann versus Fed Ex* case had certified this issue to the
24 Massachusetts Supreme Judicial Court about whether -- it's
25 determined under Massachusetts law that deductions from wages

1 are a violation of the Wage Act.

2 But what's not a 100-percent clear under Massachusetts law
3 is whether expenses, out-of-pocket expenses that are paid to
4 third parties are reimbursable, as they clearly are under
5 California law, under 2802.

6 **THE COURT:** So there's no 2802 obvious analog?

7 **MS. LISS-RIORDAN:** There's no statutory 2802,
8 although there's suggestion in the case law, including in the
9 case of *Allula versus Coverall* (Phonetic) that the SJC decided
10 in 2011, suggests that some or all may be. But the Federal
11 Court in the *Schwann versus Fed Ex* case found this issue to be
12 uncertain enough that it needed to be certified to the SJC. So
13 I'm --

14 **THE COURT:** Are you inviting Mr. Boutrous to then
15 participate in an early adjudication of that issue, with the
16 idea that if he prevails, that that may be the end of this
17 case?

18 **MS. LISS-RIORDAN:** Well, that would be the end of
19 that claim. But remember, in this case, we also put in claims
20 for overtime and minimum wage, because we're not 100 percent
21 sure about how those reimbursement claims are going to come
22 out. So, no, that wouldn't be the end of this case.

23 But the significant -- the most -- like in the O'Connor
24 case, the most significant potential damages is the expense
25 reimbursement. I think they're recoverable under Massachusetts

1 law.

2 **THE COURT:** Okay, wait a minute. I'm not sure what
3 you're asking.

4 You want an early partial summary adjudication of that
5 issue, to what end? So that it gets appealed to the Ninth
6 Circuit, so the Ninth Circuit can certify -- well, the Ninth
7 Circuit can't certify --

8 **MS. LISS-RIORDAN:** They can't? To the Massachusetts
9 Supreme Judicial Court? Why not?

10 **MR. BOUTROUS:** Your Honor, this is massively putting
11 the cart before the horse. First we have to determine whether
12 these individuals are employees. Then we have to, like,
13 leapfrog into the Massachusetts Supreme Court on only part of
14 the case.

15 And this Court ordered, as you'll recall, that no
16 summary-judgment motion could be filed unless the Plaintiffs
17 sought leave. We think that there's a one-way intervention
18 problem, as we argued before. It's clear.

19 And again, this -- this complication -- let's just
20 litigate the cases like we normally would, and -- and proceed
21 forward. And I don't think that that proposal makes any sense.

22 **MS. LISS-RIORDAN:** Your Honor, I would just say that
23 I'm --

24 **THE COURT:** I'm not going to do anything in that vein
25 yet. That's too far in advance. And frankly, it sounds like

1 it's not the most efficient use of judicial resources, to break
2 it up and have -- anyway, it's premature. Let's get to first
3 base. Let's see where we are at on the arbitration question.

4 So my only question now is whether the parties are
5 interested in engaging in any kind of ADR process in this case.

6 **MR. BOUTROUS:** Your Honor, I'll --

7 **THE COURT:** Same response.

8 **MR. BOUTROUS:** Same response.

9 **THE COURT:** All right.

10 **MS. LISS-RIORDAN:** We're open to it. We're here.

11 **THE COURT:** Okay. Well, it takes two to tango. So,
12 let's -- I need to hear back from you about a, quote, trial
13 schedule on this formation question.

14 And what I want do is set, so it doesn't slip through, a
15 control date for a status conference which we can vacate once
16 we figure it out. But let's set a status conference for 90
17 days out.

18 **THE CLERK:** November 19th at 10:30.

19 **MS. LISS-RIORDAN:** What about -- well, I think we're
20 going to be back before you on -- Uber just filed their motion
21 to compel arbitration on the new Plaintiffs. So I think that's
22 noticed for late September. So we'll be back before you, I
23 believe it's September 24th.

24 Anyway, so I just wanted to point that out.

25 **THE COURT:** Okay, let's just make it September 20th.

1 We'll double it up.

2 **MR. BOUTROUS:** Actually, can we stick with 11-19?

3 That would be better, I think, for a number of reasons.

4 (Off-the-Record discussion between counsel)

5 **THE COURT:** All right. 11-19 for status conference.

6 Might be advanced if you can stipulate on a, quote, trial date

7 before then.

8 **MR. BOUTROUS:** Perfect.

9 (Off-the-Record discussion between the Court and Clerk)

10 **THE COURT:** That's for the Yucesoy case. We didn't

11 set a status, did we, in the Mohamed and Gillette case, did we?

12 Do we have another --

13 (Off-the-Record discussion between the Court and Clerk)

14 **THE COURT:** Okay, we'll set a status date for

15 August 27th.

16 (Reporter interruption)

17 **THE COURT:** On Gillette and Mohamed, we will set a

18 further status conference date at the hearing on August 27th.

19 **THE CLERK:** At 1:30, counsel.

20 **THE COURT:** All right?

21 **MR. BOUTROUS:** All right. Thank you.

22 **THE COURT:** Thank you.

23 **MS. LISS-RIORDAN:** Thank you, Your Honor.

24 (Proceedings concluded)

25

CERTIFICATE OF REPORTER

I, BELLE BALL, Official Reporter for the United States Court, Northern District of California, hereby certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Belle Ball 

Sunday, August 16, 2015

Belle Ball, CSR 8785, CRR, RDR